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In the Supreme Court of the United States

OCTOBER TERM, 1951.

No. 250.

UNITED STATES OF AMERICA,
Appellant,

v.

NEW WRINKLE, INC. and THE KAY & ESS COMPANY,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

BRIEF OF APPELLEE, NEW WRINKLE, INC.

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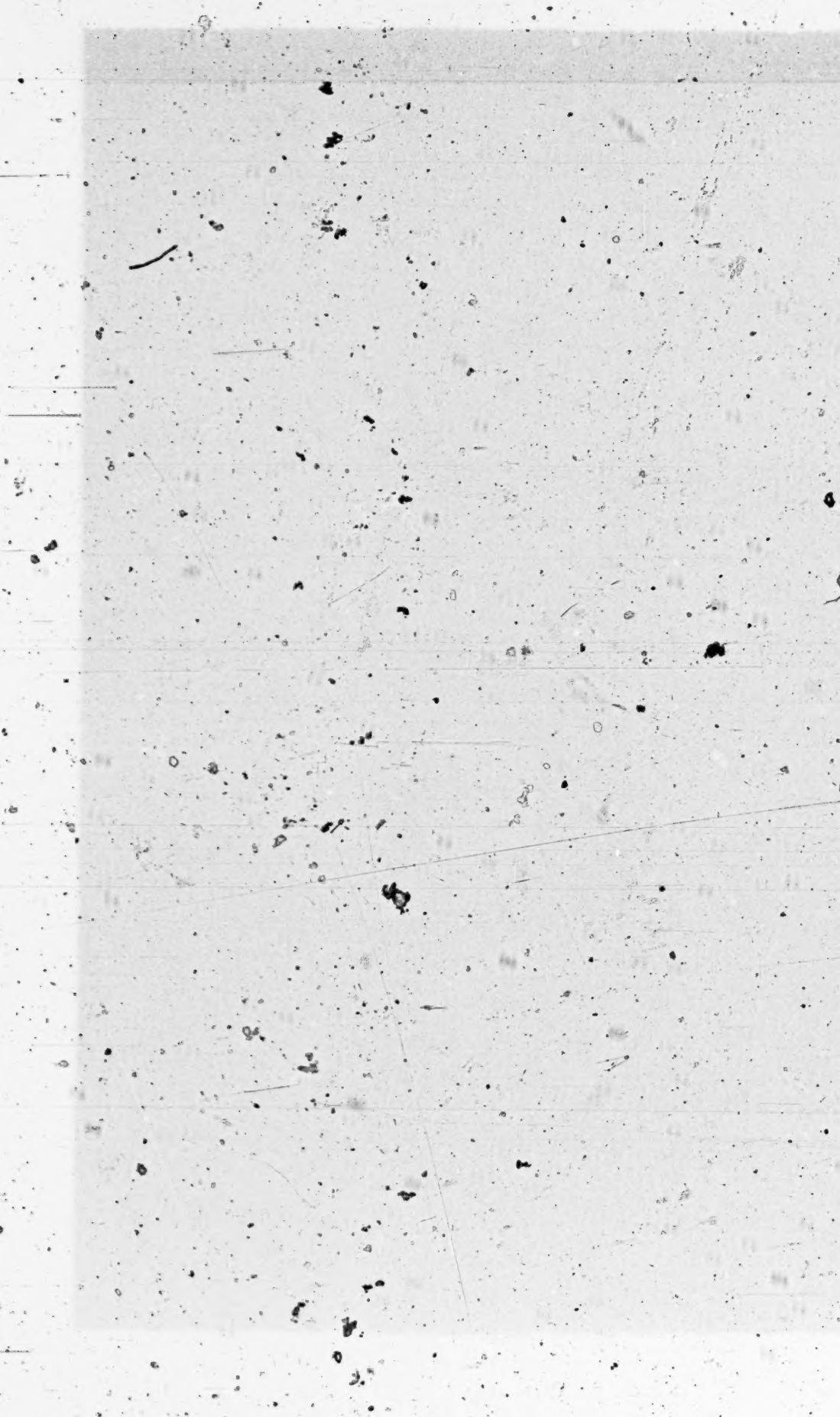

INDEX.

Opinion Below 1

Jurisdiction and Statutes 1

Statute Involved 2

State of the Record Below 3

No Appeal by Appellant on Jurisdictional Issue Decided Against It Below 3

Appellant's Questions Presented Omit Controlling Facts 3

Questions Presented by the Appellee Based Upon the Facts in This Particular Case 4

Factual Background from the Appellant's Complaint for Questions Presented 4

Questions Presented 6

Basis of Factual Statement 7

Principles of Previous Decrees by This Court Followed by Appellee 8

Rule of Reason Applied to Patent License Contracts 10

Statement of the Facts 11

History of the Transaction 11

Uniformity Sign of Illegality Only in "Two Way" Contracts 16

The License Contract (§ 20 Complaint) 18

Features of the New Wrinkle License Agreement (Exhibit C) 18

The Price Fixed by the Licensor Was a Minimum; It Did Not Restrict the Licensees from Full Competition on the Great Varieties of Wrinkle Finishes Which Vary Widely in Composition, Quality and Purpose 24

Uniformity of License Contracts Under the Court's Decrees 25

Reasonableness of Price Fixed Under the License is Not An Issue 26

Inconsistent Position of Appellant on the Facts 27

First Inconsistency 27

Second Inconsistent Position of Appellant 28

Chadeloid and Kay & Ess Not Competitors 30

What is Left of the Alleged Conspiracy Claimed by Appellant on the Facts of This Particular Case? 31

Outline of the Argument 33

Basic Principles Established by This Court Upon Which Appellee Relies as the Foundation for Its Argument 33

ARGUMENT.

Point I. General Principles Established by This Court Upon Which Appellee Relies 37

New Wrinkle Has the Legal Right to Grant Uniform License Contracts to All Manufacturers Alike 37

The Terms of the New Wrinkle Contract Are Those Approved by This Court 38

New Wrinkle's Unusual Licensing Plan Discourages Restraint of Trade 38

The Settlement of Patent Litigation to Open All Patents to an Entire Industry Is Lawful 39

The Absence of Cross-Licensing in New Wrinkle Contract is a Badge of Legality 39

Point II. The "One Way" Contract of General Electric Contrasted with the "Two Way" Contract of Gypsum and Line Material 41

New Wrinkle and Chadeloid Were Not Manufacturers; and Not Competitors of Kay and Ess 41

New Wrinkle's Only Objective: Royalty Income From Patents 41

New Wrinkle's Interest Was Patent Royalties: Not Price Fixing for Itself 42

Uniformity of License Contract Only Important When Cross-Licenses: Then it Becomes a Matter to Determine Illegality 42

Point III. The Wrinkle Contract Controls Its Operation 43

New Wrinkle Uses a "One Way" Contract; Its Sole Link With Its Licensee Manufacturer Was Its License 43

Absence of New Wrinkle's Commercial Intent in Manufacturing is a Guarantee of Its Disinterest in Mutual Price Control 44

Point IV. The Terms of the License Contract Govern Its Legality: the Background of Facts Demonstrate Its Full Compliance With the Anti-Trust Laws 45

New Wrinkle's Objective Was the Maximum Enjoyment of the Patent Grant: It Had No Interest in "Commerce" 45

New Wrinkle's License Devoted Solely to Patent Matters 46

New Wrinkle License Based Upon the Form of License Approved in Decrees by This Court 46

The Chadeloid-Kay and Ess-New Wrinkle Settlement Was Based Solely on Patent Royalty Income 47

Appellant Disregards the Critical Factual Differences Between Its Authorities and the Facts of This Case 47

Kay and Ess was Forced to Take a Standard License so Chadeloid Could Get the Major Share of its Royalties 48

Point V. The Fact That New Wrinkle Is Not A Manufacturer Does Not Deprive It of the Right to Fix the Price for Its Licensees Under the General Electric Case 49

The Basic Principle of the General Electric Case is that a Patent Owner Can Protect His Income from Patents, Whether Manufacturing or Royalty Income, by Fixing His Licensee's Minimum Price 49

Appellant's Position that the "General Electric Case" Only Applies to Manufacturing Patentees Is Unsound in Law 51

There Has Been No Conspiracy to Unreasonably Restrain Commerce 51

Rebuttal to Government's Argument 53

Point VI. New Wrinkle by Only Issuing Patent Licenses and Not Manufacturing is Not Engaged in "Commerce" to Bring It Within the Anti-Trust Laws: Patent Licenses are Exempt from the Anti-Trust Laws Both Because Contracts Are Not "Commerce" and Because Patent Licenses Per Se Are Solely Within the Patent Laws 62

Discussion of Jurisdiction 67

The Mere Fact That Patent Licenses as Personal Services Deal with Products Shipped in Interstate Commerce Does Not Make Patent Licensing Interstate Commerce 67

Conclusion 77

TABLE OF AUTHORITIES.

Cases.

American Tobacco Co. v. United States, 221 U. S. 106 10

Anderson v. United States, 171 U. S. 604 ..... 37, 64, 67, 69

Apex Hosiery Company v. Leader, 310 U. S. 469 ..... 37, 64, 70, 71

Appalachian Coals, Inc., et al. v. United States, 288 U. S. 344 ..... 4, 30, 45

Associated Press v. Labor Board, 301 U. S. 103 ..... 65, 74

Atlantic Cleaners & Dyers v. United States, 286 U. S. 427 ..... 64, 66

Automatic Radio v. Hazeltine Research, Inc., 339 U. S. 827 ..... 15, 17, 20, 22, 25, 33, 34, 37, 38, 55

Bement & Sons v. Harrow, 186 U. S. 70 ..... 9, 15, 21, 28, 34, 35, 36

Chicago Board of Trade v. Olsen, 262 U. S. 1 ..... 65, 73

Chicago Board of Trade v. United States, 246 U. S. 231 ..... 4, 30, 45

De Forest Radio v. United States, 273 U. S. 236 ..... 34, 40

Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corporation, 340 U. S. 147 ..... 36, 45

Hill v. Wallace, 259 U. S. 44 ..... 65, 73

Hopkins v. United States, 171 U. S. 578 ..... 37, 65, 66, 67, 69, 73

Industrial Association of San Francisco v. United States, 268 U. S. 64 ..... 65, 67, 73

Jewel Tea Co. v. Williams (C. C. A. 10), 118 F. (2nd) 202 ..... 66, 76

Levering & Garrigues Co. v. Morrin, 289 U. S. 103 ..... 65, 74

Lipson v. Socony Vacuum Corporation (C. C. A. 1), 87 F. (2nd) 265 ..... 67, 76

Local 167 v. United States, 291 U. S. 293 ..... 65, 74

Meccano, Ltd. v. John Wanamaker, 253 U. S. 136 ..... 3, 7, 26, 53

Moore v. New York Cotton Exchange, 270 U. S. 593 ..... 65, 67, 73, 76

New York Life Ins. Co. v. Cravens, 178 U. S. 389 ..... 66, 76

New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495 ..... 66, 76

North American Co. v. S. E. C., 327 U. S. 686 64

Paramount Pictures v. United Motion Pictures T. O. (C. C. A. 3), 93 F. (2nd) 714 65

Schechter Corp. v. United States, 295 U. S. 495 ..... 67, 76

Standard Oil Co. v. United States, 221 U. S. 1 10

Standard Oil v. United States, 283 U. S. 163 ..... 12, 13, 20, 25, 33, 34, 38, 39, 59, 61, 69

Standard Sanitary v. United States, 226 U. S. 20 60

Sugar Institute v. United States, 297 U. S. 553 ..... 4, 30, 33, 45

Swift & Co. v. United States, 196 U. S. 375 64

Temco v. Apco, 275 U. S. 319 ..... 12, 34, 39

Transparent-Wrap Machine v. Stokes and Smith Co., 329 U. S. 637 ..... 34, 38, 41

United Leather Workers v. Herkert & Meisel Trunk Co., 265 U. S. 457 ..... 65, 67, 70, 74

United Mine Workers of America et al. v. Coronado Coal Company et al., 259 U. S. 344 70

United Shoe Mach. Co. v. United States, 258 U. S. 451 ..... 65, 72

United States v. General Electric, 272 U. S. 476 ..... 9, 15, 21, 28, 34, 35, 36, 39, 42, 43, 44, 49, 50, 54, 55, 56, 57, 58, 59, 60, 62, 68, 69, 70, 71

United States v. General Instrument Corp., 87 F. Supp. 157 61

United States v. Gypsum, 333 U. S. 364 ..... 9, 20, 22, 28, 29, 30, 32, 34, 35, 36, 39, 40, 41, 42, 43, 44, 48, 58, 59

United States v. Gypsum, 340 U. S. 76 42

United States v. Hutchinson, 312 U. S. 219 ..... 65, 66, 74

United States v. Joint Traffic Association, 171 U. S. 505 ..... 37, 67

United States v. Line Material, 333 U. S. 287 ..... 9, 20, 22, 28, 29, 30, 32, 34, 35, 36, 39, 40, 41, 42, 43, 44, 48, 49, 58, 59, 68, 69, 70, 71, 75, 76

United States v. National Lead, 332 U. S. 319 ..... 9, 20, 22, 30, 34, 36, 40

United States v. Socony-Vacuum Oil Co., 310 U. S. 150 27

United States v. Trenton Potteries, 273 U. S. 392 27

United States v. Underwriters Assn., 322 U. S. 533 ..... 63, 74

United States v. Univis Lens Co., 316 U. S. 241 ..... 69, 71

United States v. Vehicular Parking, Ltd., 54 F. Supp. 828 58

United States v. Yellow Cab Co., 332 U. S. 218 ..... 37, 61, 64, 67

Ware & Leland v. Mobile County, 209 U. S. 405 ..... 65, 66, 67, 72, 76

Washington Brewers Institute v. United States (C. C. A. 9), 137 F. 2nd 964 64

Western Live Stock v. Bureau of Revenue, 303 U. S. 250 ..... 65, 66, 72

Statutes.

Sherman Act:

Section 1 (15 U. S. C. 1) 1, 2, 68

Section 4 (15 U. S. C. 4) 1, 2, 3

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BRIEF OF APPELLEE, NEW WRINKLE, INC.

OPINION BELOW.

The Court below sustained the motion of New Wrinkle, Inc. to dismiss for lack of jurisdiction, after arguments and briefs, on the grounds that patent licensing by New Wrinkle, Inc., which does no manufacturing, was not "commerce"; and patent licenses were solely within the Patent Laws and not within the purview of the Sherman Anti-Trust Act.

JURISDICTION AND STATUTES.

As noted above the District Court found as to New Wrinkle Inc. that its mere issuing of patent licenses, under the Patent Laws without manufacturing, was not "commerce" within the meaning of Sections 1 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1, 4) commonly known as the "Sherman Act."

In view of the fact that this Court has stated there is "probable jurisdiction," this brief will present New Wrinkle's position on the basis (a) if there is jurisdiction, then no cause of action is stated and there is no violation of Sections 1 and 4 of the "Sherman Act" under the facts pleaded (but not the legal conclusions in the complaint); and (b) there is no jurisdiction over mere patent licensing, unaccompanied by manufacturing, which the Appellant admits the Appellee, New Wrinkle, did not do (T. R. 2 § 11).

The Appellant failed to appeal on the jurisdictional issue raised by New Wrinkle on which it prevailed below.

It is Appellee's position that the only issue, at most, before this Court is the question of jurisdiction: and that, if such issue is decided against it, this case should be remanded for answer and trial to present all the facts on the merits to the District Court.

However, out of respect for this Court having noted "probable jurisdiction," we are presenting our views on the merits to the extent that the ultimate facts as pleaded by the Appellant in its complaint, *less its argument and legal conclusions,* will permit us to do. We, therefore, defer discussion of the jurisdictional question until the end of this brief.

STATUTE INVOLVED.

The pertinent provisions of Sections 1 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1, 4), commonly known as the Sherman Act, are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal:

* * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.

Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *.

STATE OF THE RECORD BELOW.

New Wrinkle, Inc. made a motion to dismiss for lack of jurisdiction under the Anti-Trust Laws of the United States based upon the facts as to jurisdiction in the complaint (T. R. 23-25). Other non-jurisdictional facts or argumentative conclusions were not involved in our motion to dismiss and therefore not admitted to be true. *Meccano, Ltd. v. John Wanamaker*, 253 U. S. 136. The motion was sustained (T. R. 27).

NO APPEAL BY APPELLANT ON JURISDICTIONAL ISSUE DECIDED AGAINST IT BELOW.

There is no question presented by the Appellant on jurisdiction in its three questions presented to this Court.

APPELLANT'S QUESTIONS PRESENTED OMIT CONTROLLING FACTS.

The Appellant has presented three questions for consideration by this Court. Its statement of the questions presented *omits facts of vital importance which characterize the conduct of the Appellee*, New Wrinkle, as pleaded by the Appellant in its complaint, with the consequence

that these questions are inaccurate, misleading and do not form a basis for applying the law in view of the facts in this case.[1]

Every Anti-Trust case must be decided on the basis of its own facts; and not on the basis of theoretical questions disregarding those facts. Appellant by its omissions so phrased its questions so as to force only the answer the Appellant wants, irrespective of the fact that the facts in this case compel a completely different answer.

Chicago Board of Trade v. United States, 246 U. S. 231, 238; *Appalachian Coals, Inc., et al. v. United States,* 288 U. S. 344, 360, 361; *Sugar Institute v. United States,* 297 U. S. 553, 600.

QUESTIONS PRESENTED BY THE APPELLEE BASED UPON THE FACTS IN THIS PARTICULAR CASE.

Factual Background from the Appellant's Complaint for Questions Presented.

A patent holding company, Chadeloid Chemical Company, held basic patents on an enamel finish called "wrinkle." A non-competitive manufacturer, Kay & Ess Company, owned practical patents on wrinkle finishes it was manufacturing. Litigation arose between them under Chadeloid's broad patents and a patent impassé followed. To settle the problem both parties *assigned* their patents to a new Company, New Wrinkle, Inc.

In return for substantially equal amounts of common stock and preferred stock, of which Chadeloid secured the major share, the patents of both Chadeloid and Kay & Ess were sold to New Wrinkle, Inc. in 1937 (T. R. 3).

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[1] *Chicago Board of Trade v. United States,* 246 U. S. 231, 238; *Appalachian Coals, Inc., et al. v. United States,* 288 U. S. 344, 360, 361; *Sugar Institute v. United States,* 297 U. S. 553, 600.

New Wrinkle, Inc. is not and never has been a manufacturer (T. R. 2). It then offered to all manufacturers in the industrial paint field a non-exclusive license, Exhibit C (T. R. 3 & 4), under which it licensed under all of its present patents and future patents for 5¢ a gallon royalty. The Licensee gave nothing except the royalty to New Wrinkle. The Licensee could cancel on 3 months notice. Paragraph 7 of the license provided New Wrinkle could direct the minimum price at which the Licensee sold. There was no price control of New Wrinkle's activities, as it did not manufacture and was not competitive with the Licensee manufacturer. It did not secure any rights under the Licensee's patents.

Under the price control provision (a) the Licensee could cancel immediately any time within 30 days after so being informed of the price; and (b) New Wrinkle announces its policy of basing the price on the cost of labor and materials reported from time to time by the U. S. Department of Labor and U. S. Department of Commerce and announced as its policy the following:

> "* * * **it being the intent and purpose of the Licensor to open to the entire trade the use of these patents so licensed at the lowest price consistent with a reasonable profit to the manufacturer, Licensee, the trade, and to this Licensor.** * * *"

It was stipulated by Licensor it would treat all Licensees alike as to royalty and price of Licensee's product so directed.

This license was so offered to the entire industry, as the license now stands, to accept or reject. Several hundred companies have accepted it. As it was unknown in the beginning whether this new finish would be manufactured and sold by the industry in quantity, it was necessary to secure the signatures of some nineteen manufac-

turers before their signatures would be binding on all of them in order to insure sufficient volume at the 5¢ royalty to make the return and value of the license worth-while. No preference was given these nineteen manufacturers.

Upon this set of facts based on the complaint, the questions presented for your decision on the merits are:

QUESTIONS PRESENTED.

1. Whether a settlement of the litigation between non-competitors and a patent holding company (Chadeloid) owning broad patents with a manufacturer (Kay & Ess), owning practical patents in the same field, by creating a new patent holding company (New Wrinkle), not a manufacturer, and assigning and selling to it the patents of both parties for substantially equal amounts of stocks in the new patent holding company, violates the Anti-Trust Laws?

2. Whether the new, non-manufacturing patent holding company, New Wrinkle, Licensor, organized to prevent further litigation by offering all wrinkle patents to the whole industry, to issue to any or all manufacturers without restrictions a uniform contract of patent license under all of its present and future patents which it owned outright for a royalty of about one percent based on the sales of the Licensee, with an option to the Licensee to cancel the contract, and which license contains a provision for the fixing of the Licensee's minimum sales price for the patented subject matter by the Licensor based upon U. S. Government figures of cost of labor and materials, with the further provision the Licensee can cancel within 30 days after the announcement of the price, has violated the Anti-Trust Laws by so doing?

3. Whether, under the Anti-Trust Laws the offering by New Wrinkle, a non-manufacturer, of the same license contract, containing a stipulation that the Licensor can direct the minimum sales price of the Licensee, to any and all manufacturers without distinction on a uniform basis with full option to cancel at any time and a commitment by the Licensor not to discriminate between Licensees, is legal?

4. Whether a non-manufacturing patent owner, New Wrinkle, performing no other function except issuing licenses under its patents is within (a) the Patent Laws only and therefore not subject to the Anti-Trust Laws; and (b) whether the sole activity of issuing patent licenses is such "commerce" within the meaning of the Anti-Trust Laws to bring the simple issuing of patent licenses within those laws?

Basis of Factual Statement.

This statement is based upon the Appellant's complaint with its attached exhibits. We have based it upon the ultimate facts so pleaded, as we assume its legal conclusions and arguments are not admitted by Appellee's motion to dismiss, as otherwise no litigant would dare to make a motion to dismiss where pleadings contain more than the ultimate facts. In *Meccano, Limited, v. John Wanamaker, New York*, 253 U. S. 136, 141, 142, this Court said:

> "Petitioner maintains that its motion for final decree upon the merits should have been sustained. But the appeal was from an interlocutory order and the court could only exercise powers given by statute. On such an appeal a cause may be dismissed if it clearly appears that no ground exists for equitable

relief; but finally to decide a defendant's rights upon the mere statement of his adversary, although apparently supported by ex parte affidavits and decrees of other courts, is not within the purview of the act. He is entitled to a day in court with opportunity to set up and establish his defenses. The motion for final judgment was properly overruled. *Eagle Glass & Manufacturing Co. v. Rowe*, 245 U. S. 275, 281." (Emphasis ours.)

Principles of Previous Decrees by This Court Followed by Appellee.

We ask this Court, in reading our factual statement, based upon Appellant's pleading, to compare the actions of the Appellee and the terms of its license contract with the decrees which you have approved in patent cases involving the Anti-Trust Laws. You will find that the Appellee, as far back as 1937, when it started issuing its standard license contract, embodied exactly the features specified by this Court in later years to correct violations of the Anti-Trust Laws in connection with patent licenses, to wit:

(a) Provide a non-exclusive license contract open to any responsible manufacturer in the industry with the privilege of cancelling it at the Licensee's option.

(b) Supply technical information to the Licensees and give them the benefit of any new patents taken out by the Licensor without any increase in royalty.

(c) Establish a reasonable royalty for use of the patented subject.

(d) Omit any requirement that the Licensee give any rights under his patents to the Licensor.

(e) Eliminate cross-licenses.

(f) Eliminate control of unpatented materials.

(g) Eliminate control of any merchandizing or distribution operations of the Licensee.

(h) Insure equal treatment to all Licensees: and permit any responsible manufacturer to take the license.

(i) Preserving the right of the Licensee to take or drop the license when it pleases without reason.

(j) Insure the use of future patents without additional royalty.

Such are the provisions in Appellee's license Exhibit C attached to the complaint, a typical "one way" contract.[1]

We have added to the above, in this "one way" contract presented to the Licensee without negotiation, the right of the Licensor to fix the minimum price at which the Licensee sells the patented wrinkle finishes. There is no agreement by New Wrinkle, Inc. as to any price it might make, if it were to manufacture. New Wrinkle has never manufactured. This action is in exact accord with *E. Bement & Sons v. Harrow*, 186 U. S. 70; and *United States v. General Electric*, 272 U. S. 476.

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[1] We have adopted a convenient method of designating a contract as a "one way" contract in which a patent owner gives a License to a manufacturer and receives nothing in return except royalties; and the patent owner has the right in a "one way" contract to direct the minimum price at which the Licensee sells the patented subject matter. Such a "one way" contract will be found in *Bement v. National Harrow*, 186 U. S. 70, and *U. S. v. General Electric*, 272 U. S. 476.

On the other hand, a "two way" contract is one such as considered in *U. S. v. Gypsum*, 333 U. S. 364, *U. S. v. Line Material*, 333 U. S. 287, and *U. S. v. National Lead*, 332 U. S. 319. In the foregoing cases there was a "two way" deal by which a cross-license was effected or there was an exchange of license and patent rights with a price control in each contract so that there was a reciprocal price fixing "two way" agreement. In such cases the parties were competitive manufacturers, the price stipulated by the manufacturing Licensor was agreed would be the same as that fixed for the Licensees. *U. S. v. Gypsum*, 333 U. S. 364, 381, 382; and even non-patented subject matter was controlled.

RULE OF REASON APPLIED TO PATENT LICENSE CONTRACTS.[1]

We believe we have a solution in this contract for the problem of reconciling patent monopoly versus Anti-Trust Anti-Monopoly. By following the pattern of your decisions and decrees as a result of which we accord equal treatment to all Licensees, promote the widest possible use of the patents and accordingly dilute the patent monopoly, all in the public interest, and compensate the owner of the patent with a small royalty that becomes a substantial amount from the volume of production so encouraged.

We compensate the Licensee for the large number of competitive Licensees by stipulating the price at which he sells, based upon published U. S. Government figures as to the cost of labor and materials, thereby insuring to the manufacturing Licensee a basically sound price to induce him to manufacture at a fair profit and a fair price to the consumer to insure volume purchases by the public at a reasonable price. We protect the property in patents of the Licensor by price control of the Licensee's price to encourage widespread adoption of the license. By basing the Licensor's action on published Government figures of costs, we eliminate any possibility of collusion and agreement on prices contrary to the public interest.

New Wrinkle fixes Licensee's prices based on government figures and not based upon its own price.

This is the application of "the rule of reason" to patent licensing under the Anti-Trust Laws. The price control protects the interest of the owner of the patent in his royalties which depend for volume upon the satisfaction of the consumer with the price and quality and upon the manufacturing Licensee's satisfaction with a profitable line

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[1] *Standard Oil Co. v. United States*, 221 U. S. 1; *American Tobacco Co. v. United States*, 221 U. S. 106.

that justifies his manufacturing investment and sales efforts.

Thus the primary basis for all patents, the public interest in the widest possible use of the patents, is best served and the profit to the patent owner follows in its logical place, second to the public interest.

That is why the license Exhibit C (T. R. 13) contains the provision of this announcement of policy by New Wrinkle:—

> **"* * * it being the intent and purpose of the Licensor to open to the entire trade the use of these patents so licensed at the lowest price consistent with a reasonable profit to the manufacturer, Licensee, the trade, and to this Licensor * * *."**

It is significant that the Department of Justice, diligent as it is, made no complaint about this same reasonable contract for a period of eleven years, although widely known as being used by hundreds of companies selling millions of gallons of wrinkle finish, which created a whole new segment of American industry.

STATEMENT OF THE FACTS.

History of the Transaction.

The Chadeloid Chemical Company was a patent holding company and not a manufacturer. It had taken out patents of broad character on a new enamel which wrinkled when baked.

The Kay & Ess Company was a paint manufacturer. It had developed several very practical ways of manufacturing wrinkle finish upon which it secured patents.

Patent litigation arose between the parties where the non-manufacturer, Chadeloid, had broad patents covering the more practical developments of the paint manufacturer, Kay & Ess. This is a familiar impasse in Patent Law

which frequently results in both parties and the public losing because of the stalemate unless a way out is found—*Standard Oil v. United States*, 283 U. S. 163; *Temco v. Apco*, 275 U. S. 319, 328. (See paragraph 14 complaint in this case.) (T. R. 3.)

To overcome this impasse and make it possible for both parties to secure a return by way of patent royalties and to enable the manufacturer, Kay & Ess, to protect itself against the effect of litigation and infringement by Licensees of Chadeloid, the parties contracted to form a new company known as New Wrinkle, Inc. To this company was assigned outright all of the wrinkle patents of both parties in return for common and preferred stock in the new corporation (paragraph 16 complaint). (T. R. 3, 4.)

As Chadeloid was not a manufacturer and Kay & Ess was a manufacturer, *it is obvious they were not competitors*. Kay & Ess, however, had competitors in other manufacturers who were either Licensees of Chadeloid or infringers of wrinkle finish patents. As the co-owner of New Wrinkle, Inc. its interests were dual in extending licenses to competing manufacturers: First, to control such infringing manufacturing competitors by license to protect its business; and, second, to secure the income from New Wrinkle based upon the royalties by way of New Wrinkle's dividends. Chadeloid had its interest in securing dividends from New Wrinkle, Inc., based upon the royalty return and the elimination of litigation.

As a result Chadeloid and Kay & Ess agreed to form New Wrinkle and use the form of license, Exhibit C (T. R. 12).

Licenses like Exhibit C were offered to the entire industrial finish industry. As will appear from the exhibits, large numbers of such manufacturers competing with Kay

& Ess took licenses. New Wrinkle, Inc. became a patent holding company and did not manufacture (T. R. 2).

No claim is made here by the Government of any cross-licenses. No claim is made of controlling any unpatented materials: indeed, the contract in fixing the price at which a Licensee sold the wrinkle finishes was accompanied by certain instructions as to the basis of payment and prices on various types of wrinkle finishes. In such regulations it is *carefully specified that any materials not covered by the patents on wrinkle finishes must be excluded from any inclusion in the pricing under the patent license* (T. R. 16).

These licenses were based upon these simple principles: to grant a non-exclusive license to any paint manufacturer; and to give him a ten-year contract which he could drop at any time he pleased, upon notice. Mr. Justice Brandeis in *Standard Oil v. U. S.*, 283 U. S. 163, supported, in an opinion on behalf of this Court, this plan of an **"open end"** license to promote competition and not restrain it, saying:

> "* * * If the available advantages are open on reasonable terms to *all* manufacturers desiring to participate, *such interchange may promote rather than restrain competition.* * * *" (Emphasis ours.) (p. 171.)

There was no limit to the number of paint companies who could take the license; the price control was not the subject of a cross-license, or any agreement with the licensee. It was stated in the contract that New Wrinkle would fix the price basing it upon the U. S. Department of Labor prices of labor and upon the U. S. Department of Commerce reports of material costs. **This latter provision was to insure equal, fair treatment of the Licensees in the fixing of the price which was thus based upon public U. S.**

Government records to avoid the charge that New Wrinkle was agreeing with manufacturers on the price. As a further protection to the Licensees it was provided that in the event that the Licensee did not like the price so fixed it had 30 days in which to withdraw and cancel the license. **New Wrinkle, not a manufacturer, had no occasion to deal in fixing its own price.** This is what is known as an "open end" license "one way" contract in that anyone can have a license at any time and take it or drop it substantially at will. Hundreds of manufacturers have elected to do so since 1937 (§ 11 complaint). The patent monoply has been shared with any manufacturer.

When this offer of a license was made it was explained to various groups of paint manufacturers who were prospective Licensees and others by mail. Because manufacturers do not want to be competitively handicapped unless a relatively new product will have volume production[1] some of them stipulated that they would not take this license unless a sufficient number took the license to insure that there would be enough manufacturers who were selling and promoting this new finish to make it a worth-while business of substantially some volume, and **New Wrinkle did not want to license at the low rate of 5¢ a gallon under a non-exclusive license unless it secured volume to insure a satisfactory profit.**

In an "open end" license the public gets the benefit of widest possible manufacturing sources, plus the development work of a large number of companies in adapting the inventions to numerous uses. To insure this, the contract

[1] Contrary to popular and some legal opinions, experienced manufacturers want competition in launching a relatively new product as there is enough business for all and the sales costs and public resistance are greatly reduced by the sales efforts of multiple manufacturers.

under consideration had to treat all Licensees alike, whether large or small. It was therefore uniform to all. Secondly, there had to be a very small royalty per gallon so that it made no difference whether the manufacturer was large or small, he paid his five cents a gallon which sold for approximately $3.00 a gallon and up. (See Exhibits C and D, T. R. 12-22.) **By providing for cancellation of the contract at will the Licensee could test the validity of the patents. There was no cross-license. There was no requirement that the Licensee turn over his patents. There was no discrimination between Licensees.**

The essentials of the license are described by Appellant in paragraph 20 of the complaint as follows:

In the foregoing averment (A), "Each Licensee is licensed under New Wrinkle patents to make, use and sell wrinkle finishes;": that is the patentee's right as established by this Court.

In paragraph (B) it is provided that New Wrinkle establishes the price at which its Licensees sell. This is authorized under *E. Bement & Sons v. National Harrow*, 186 U. S. 70, and *United States v. General Electric*, 272 U. S. 476.

Under paragraph (C) the Licensee pays a royalty of 5¢ on each gallon of wrinkle sold or used. *Automatic Radio v. Hazeltine Research, Inc.*, 339 U. S. 827.

Under paragraph (D) the prices, terms and conditions may be changed by New Wrinkle on 30 days notice and if the Licensee did not like the price he could cancel the contract, under the *Bement* and *General Electric* cases.

Such is the Government's own statement on this simple contract.

Uniformity Sign of Illegality Only in "Two Way" Contracts.

We are aware, as elsewhere discussed, that where all license contracts are the same, it has been claimed that this shows an illegal agreement; and we are aware it has also been so claimed that where a license provides that if any better terms have been given to anyone else, that the contract will be modified to give the Licensee the same terms, is inuication of illegality.

But such holdings have been in cases where competitive manufacturers cross-licensed one another with a mutual price control—a "two way" contract. Uniformity of control under such conditions has an entirely different purpose and is in effect a clear "agreement" on price. Again we say each Anti-Trust case must stand on its facts.

No manufacturer would take a license if he is not protected by these two provisions: first, if the Licensor makes better prices to a later Licensee of royalty or other terms, he must give the same treatment to the prior Licensee. It would be unfair and prevent evenhanded, free competition if this standard provision was not in the license. *This provision is the very antithesis of monopoly.* It is equally true that manufacturers will not take a license unless the licenses are all the same, with an equal chance to compete. This too, is the antithesis of monopoly and restraint of trade.

Appellant's complaint avers (para. 17) that the manufacturer, Kay & Ess, owns 51% of the common stock of New Wrinkle and 150 shares of preferred stock; and 49% of the common and 400 shares of the preferred were owned by Chadeloid. Chadeloid was not a manufacturer and was not in competition with Kay & Ess. It is not a defendant here. It was dissolved in 1945 and its assets dis-

tributed to individual stockholders (para. 5 of complaint).[1] The relationship between New Wrinkle and Kay & Ess was therefore the same as described in your opinion in *Automatic Radio v. Hazeltine Research, Inc.*, 339 U. S. 827, in referring to Hazeltine Research Inc. and its corporate affiliate.

License contract Exhibit C was offered by New Wrinkle, Inc. as a completed document for acceptance by paint manufacturers as Licensees (§§ 16, 18, 19 of complaint). As averred in the bill, a group of Licensees would not sign until enough of them would agree to do so to insure that their combined efforts in promoting this new finish would be effective. **A patented development is no better than the mass sales effort behind it.**

Despite the Government's suspicion, which the pleaded facts show to be ungrounded, the New Wrinkle contract, Exhibit C, had already been formulated before its offer to the Licensees, as the complaint indicates. The meetings of the Licensees had nothing to do with the terms of the contract. Those terms were already settled. The Licensees wanted to know what the contract meant and to be sure that enough manufacturers signed up before they were all committed for the reasons stated above. This is common sense and reasonable.

The group meetings referred to were for the purpose of explaining to prospective Licensees the terms of the contract. The completed contract, Exhibit C, was presented in the cities where the Licensees were located as there are a number of paint companies located in each of a number of prominent cities in the United States. This was a convenient method of making the explanation of the contract to groups instead of individually by mail.

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[1] This case was not filed until September 21, 1948.

This uniform contract, Exhibit C, insured that the smaller companies had the same chance of competing as the large companies and the contract insured that no special terms would be given to large companies. This is essential to unrestrained competition under a "one way" contract.

The License Contract (§20 Complaint).

Now let us look at the license contract in detail from the Appellee's point of view.

The facts of this case as set forth in the complaint in the exhibits show a simple, elementary form of **"one way"** patent license agreement open to any manufacturer to take or drop at will. It differs markedly in its simplicity and elementary character from the many cases heretofore considered by this Court involving **"two way"** contracts.

Features of the New Wrinkle License Agreement (Exhibit C).

This license agreement has the following nine provisions:

1. A non-exclusive license to make, use and sell under the New Wrinkle patents in the United States and Canada, and any additional patents without change of royalty.

2. A royalty of five cents per gallon for those wrinkle finishes covered by the patents.

3. The payment of royalty monthly with right to inspect the Licensee's records.

4. Marking of the containers, etc. with the patent notice and notice of license.

5. A license term of ten years binding only the Licensor with the provision "Licensee may, however, ter-

minate this license at any time upon three months written notice to Licensor."

6. Acknowledgment of the validity of the patents during the life of the contract.

7. Licensor reserves the right to fix prices on "products covered by patents included herein." It further provides protection for the Licensee because "* * * The Licensee may by written notice to Licensor, but only if given within such 30 day period, *elect to cancel this contract and if it does so, then said contract shall stand cancelled without any commitment or obligation by either party by reason of having entered into this contract.* * * *"

Furthermore, the license provides a second protection to the Licensee—if a price schedule is established by the Licensor it reads:

> "* * * The Licensor announces as a matter of policy that it will fix said price based upon the cost of *raw materials and labor as reported by the United States Department of Commerce and the United States Department of Labor, plus the royalty charged hereunder, it being the intent and purpose of the Licensor to open to the entire trade the use of these patents so licensed at the lowest price consistent with a reasonable profit to the manufacturer, Licensee, the trade and to this Licensor.* No schedule of Minimum Prices, Discounts and Selling Terms nor any modification or amendment or suspension thereof shall be binding upon Licensee unless at the same time and in the same terms imposed upon Licensor and all other Licensees."

8. "In the event that any subsequent license is granted with lower terms of royalty, said lower terms shall apply to the Licensee hereunder."

9. Any previous agreements between the Licensee with respect to the patents covered by the license with Licensor's predecessors in title are cancelled.

This simple contract has been granted on the same terms to hundreds of manufacturing Licensees so that all will be treated alike.

The crux of the Appellant's complaint is against the price control under paragraph 7 of the license contract. This contract (paragraph 16, T. R. 3) was completed, as pleaded by the Appellant, as a part of the settlement between Chadeloid, the non-manufacturing owner of broad patents, and Kay & Ess, the manufacturer and owner of practical patents leading to the formation of New Wrinkle, Inc., to which the respective patents were sold and assigned in exchange for stock in New Wrinkle. **Under such an arrangement any royalties paid to New Wrinkle by manufacturing Licensees would find their way** *pro rata* **to Chadeloid and Kay & Ess.** *Standard Oil v. United States*, 283 U. S. 163.

This license contract contains no agreement as to the Licensor's price and no cross-license, both of which features characterize the contracts of *"Gypsum," "Line Material"* and *"National Lead"* cases.[1] The contracts of New Wrinkle, Inc., a non-manufacturer, were all the same and were open to any responsible manufacturer in the same manner approved by this Court in *Automatic Radio v. Hazeltine Research, Inc.*, 339 U. S. 827.

To protect the Licensee and through him the purchasing public, a safeguard was entered into (paragraph 7) which authorized the Licensor to fix the minimum price of

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[1] *U. S. v. Gypsum*, 333 U. S. 364, 400, 401, 410; *U. S. v. Line Material Co.*, 333 U. S. 287; *U. S. v. National Lead Co.*, 332 U. S. 319, 335-351.

sale by the Licensee based upon U. S. Government figures as to the cost of labor and materials. There was an option to the Licensee to cancel the contract anytime within 30 days after being notified of the establishment of the price at which he was to sell.

A second privilege was to give the Licensee the right to cancel at anytime on 3 months notice for any cause.

Thirdly, there was inserted in the contract (paragraph 7) the clause for preventing any attempt to agree with the Licensee on prices by fixing the major factors to be used in setting a price by basing them upon published United States Department of Commerce and Department of Labor figures for raw materials and labor which were the controlling factors in the setting of the price by New Wrinkle. Thus the freest competition was established, leaving the fixing of the price of the Licensee solely to the Licensor, who was not a manufacturer; and as to whom there was no possibility of an agreement as to its price because it did not make or sell anything.

The Appellant makes a point that the rule of *E. Bement & Sons v. National Harrow* and *General Electric* cases permitting price control in a simple "one way" patent license **should be denied to a non-manufacturer** on the grounds that it has no business to protect.

However, the patent owner has property in patents of the same standing as manufacturing property and derives an income from the patent property, and as such is just as worthy of protection by price control as a manufacturer's income from his manufacturing business under patents which derives its value from patents. If the choice is to be made between the non-manufacturing and the manufacturing Licensor, **it would seem logical to favor the non-manufacturing Licensor who is in no position to violate**

the law by conspiring to fix a price with the Licensee by agreement.

This contract, Exhibit C, constitutes the Licensor as the sole agent for fixing the price. The Licensor *directs* the Licensee to sell at the specified price under this contract, but does not agree with it. This is strictly a "one way" contract. It differs fundamentally from the "two way" contracts of *Gypsum, Line Material* and *National Lead* in which *competing manufacturers cross-licensed* one another with price controls which were a mere subterfuge for illegal price fixing of each manufacturer.

Paragraph 8 of the Appellee's contract guarantees to all Licensees equal treatment.

While this feature of uniformity has been construed in "two way" license contracts as being a factor in the illegal conspiracy, thereby assuring uniformity of **mutual cross pricing,** yet this argument is not a valid one in the "one way" contract of license because in such a contract it merely insures that all Licensees will be treated alike and will be on an equally competitive basis without discrimination. This feature of a standard contract, uniform in its provisions, was recently approved, when a research and patent holding organization, like New Wrinkle, Hazeltine Research, Inc., issued standard, uniform "one way" contracts of patent license, thus treating all Licensees alike. In *Automatic Radio v. Hazeltine Research, Inc.,* 339 U. S. 827, 829, 831 this Court said:

> "* * * Respondent and its corporate affiliate and predecessor have for some twenty years been engaged in research, development, engineering design and testing and consulting services in the radio field. Respondent derives income from the licensing of its patents, *its policy being to license any and all responsible manufacturers of radio apparatus* at a

royalty which for many years has been approximately one percent. * * *

"The License agreement in issue, which appears to be a *standard Hazeltine* license, was entered into by the parties in September 1942, for a term of ten years. * * *

"* * * There is present here no requirement for the purchase of any goods. Hazeltine does not even manufacture or sell goods; *it is engaged solely in research activities.* Nor is there any prohibition as to the Licensee's manufacture or sale of any type of apparatus. * * * And finally, there is no conditioning of the license grant upon the acceptance of another and different license. * * *" (Emphasis ours.)

In the last feature of paragraph 7, Exhibit C, is the following sentence. After quoting this sentence, we direct your attention to the reason why it also carries out the policy announced in paragraph 7 of equal treatment of the Licensee. It reads:

"No Schedule of Minimum Prices, Discounts and Selling Terms nor any modification or amendment or suspension thereof shall be binding upon Licensee unless at the same time and in the same terms imposed upon Licensor and all other Licensees."

The purpose of this provision was to assure the Licensee that when the price control regulations and prices were changed from time to time by the Licensor, New Wrinkle, due to the changes of costs based upon United States official reports of labor and materials, that all Licensees would equally be bound by such new schedule and that the Licensor would be bound to such equality of treatment of all Licensees and would be bound to enforce them at the same time and in the same terms imposed upon the other Licensees. The price control would be pointless un-

less the Licensor is bound by it to enforce it. It did not mean that the Licensor would observe such prices for its own manufacturing because the Licensor was not a manufacturer and has never been a manufacturer as pleaded by the Appellant (T. R. 2) where the complaint says:

> "New Wrinkle has not engaged in the commercial manufacture and sale of wrinkle finishes at any time since its incorporation in 1937. * * *"

The Price Fixed by the Licensor Was a Minimum; It Did Not Restrict the Licensees from Full Competition on the Great Varieties of Wrinkle Finishes Which Vary Widely in Composition, Quality and Purpose.

The license contract recognizes that the wide diversity of the wrinkle finishes by various manufacturers will result in a wide variety of prices above the minimum due to the quality, the reliability, skill in formulation and other elements which are the principal competitive factors in the sale of wrinkle finishes.

The price schedule recognized this factor and encouraged such competition for its own benefit to stimulate the widest possible adaptation of wrinkle finishes to different conditions by saying:

> "The minimum price schedule is for the purpose of maintaining a price, below which sales of the patented compositions referred to in the license contract cannot be made without a violation of the contract agreement. The purpose of this price list is not to indicate the prices at which a sale should be made. Prices at or above the minimum price schedule will naturally vary between manufacturers because of differences in manufacturing operations, character of ingredients, variation in the formulae, uniformity and quality of finished product, etc. We have fixed the minimum prices as those which would insure to any manufac-

turer a fair minimum profit and a fair price to the public, it being understood that the public would benefit from higher prices where justified by service, quality, etc." (T. R. 17.) (Emphasis ours.)

Thus New Wrinkle did nothing except direct the Licensee to observe the minimum price and positively released the Licensee to otherwise freely compete.

Uniformity of License Contracts Under the Court's Decrees.

We find good authority for uniformity in license contracts in the decrees of this Court purging and rectifying Anti-Trust violations under patent licenses by *requiring the owner of the patents to give uniform licenses of non-exclusive type to any responsible manufacturer who seeks the license at a reasonable royalty.* That is what New Wrinkle, Inc. had already done as far back as 1937, before most of your decisions on this subject.

Likewise, this Court has frequently approved the grouping of patents under a single control of either a company set up for that purpose or owned by a research patent holding company or a manufacturer. Such accumulation of patents is legal. *Standard Oil v. United States*, 283 U. S. 163; *Automatic Radio v. Hazeltine Research, Inc.*, 339 U. S. 827, 834, saying "The mere accumulation of patents, no matter how many, is not in and of itself illegal. * * *"

The basing of royalties such as New Wrinkle's five cents a gallon, which is about a one percent royalty, has been approved by this Court in the foregoing case where you said "* * * **We cannot say that payment of royalties according to an agreed percentage of the Licensee's sales is unreasonable.** Sound business judgment could indicate that such payment represents the most convenient method

of fixing the business value of the privileges granted by the licensing agrement. * * *" (p. 834.) (Emphasis ours.)

There was no negotiation of the contract of Exhibit C with the prospective Licensees as the contract had already been formulated as shown in that exhibit, based upon the negotiation between Chadeloid and Kay & Ess. Exhibit C was formulated when New Wrinkle was formed. Then the license contract was offered to Licensees who would naturally ask questions as to the meaning of the terms of the contract (paragraphs 16-21 of the complaint). We do not admit, of course, the argumentative portions and legal conclusions gratuitously inserted by the pleader in these paragraphs. *Meccano, Ltd. v. John Wanamaker,* 253 U. S. 136, 141, 142.

The Government's own statement reduces the factual basis to this,—

(a) Chadeloid and Kay & Ess settled their patent litigation by assigning all their patents to New Wrinkle which was then formed and jointly owned.

(b) The License contract, Exhibit C, formed a part of this transaction.

(c) Exhibit C was offered to the trade and after the usual investigation was accepted without change of its terms as it remains today, the same contract since 1937.

REASONABLENESS OF PRICE FIXED UNDER THE LICENSE IS NOT AN ISSUE.

As one of its legal conclusions, the Appellant in paragraph 23 of the complaint entitled "Effect of the Combination and Conspiracy and the Contracts" says:

> "* * * fixing and maintaining identical and unreasonably high and arbitrary minimum prices, discounts and selling conditions and terms * * *" (T. R. 5).

We can disregard this allegation in view of the decisions of this Court that it will not go into the reasonableness of prices. *United States v. Trenton Potteries*, 273 U. S. 392, 397-8; *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 229.

INCONSISTENT POSITION OF APPELLANT ON THE FACTS.

First Inconsistency.

Appellant avers that "New Wrinkle has not engaged in the commercial manufacture and sale of wrinkle finishes at any time since its incorporation in 1937 * * *" (paragraph 11, T. R. 2). There is also no allegation that Chadeloid was any more than a patent holding company.

Appellant objected to our successful motion to dismiss on the ground that New Wrinkle was engaged in "commerce" such as manufacturing and selling wrinkle finishes, despite its own averment (Paragraph 11, T. R. 2) distinctly to the contrary that New Wrinkle neither made nor sold anything. **The Court accepted Appellant's pleading as correct and dismissed the case against New Wrinkle for lack of jurisdiction on the grounds that it was not a manufacturer engaging in "commerce" and that its sole activity was issuing patent licenses under the Patent Laws and thus exempt from the Anti-Trust Laws.** Consequently, the activities of issuing licenses by New Wrinkle did not come within the term "commerce" in the Anti-Trust Laws, but did come within the Patent Laws.

On the other hand, the Appellant now takes a directly opposite position in this Court that New Wrinkle is not a manufacturer or seller or is not engaged in "commerce" in wrinkle finishes (Appellant's point No. 3) and therefore New Wrinkle has no right to a price control under its

patents under the *E. Bement & Sons* and *General Electric* cases, which Appellant says are limited to manufacturers.

Either we are "in commerce" or we are not.

If New Wrinkle is not "in commerce" as a manufacturer and seller of wrinkle finishes, the decision of the Court below dismissing New Wrinkle for lack of jurisdiction under the Anti-Trust Laws should be affirmed. If jurisdiction is sustained on the ground that its activities are "commerce," then it is entitled to be sustained in its right to fix prices at which its Licensees sell under the doctrine of *E. Bement & Sons* and *General Electric* cases, under Appellant's interpretation of those cases.

Second Inconsistent Position of Appellant.

Appellant premises its case against New Wrinkle on the ground that the *Gypsum*[1] and *Line Material*[2] cases control the instant case. **In those two cases, competing manufacturers cross-license one another in a "two way" contract, each licensing the other under the respective patents of each, and each fixing the price of the other at which it would sell under the license—a clear case of competitors using the Patent Laws as a subterfuge to fix by cross-licensing both prices of both competitors at the same point.**[3]

But in the instant case Appellant avers that New Wrinkle, Inc. is not a manufacturer and is not entitled to rely upon the *E. Bement & Sons* and *General Electric* cases (paragraph 11, T. R. 2). Not being a manufacturer,

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[1] *U. S. v. Gypsum*, 333 U. S. 364, 380, 381, 382.

[2] *U. S. v. Line Material*, 333 U. S. 287.

[3] As this Court found in the *"Gypsum"* case "the Licensor agreeing that such **minimum price would be not greater than the price at which Licensor itself offered to sell.**" *U. S. v. Gypsum*, 333 U. S. 364, 381, 382. (Emphasis ours.)

it, therefore, is not a competitor of its Licensee. New Wrinkle has no reason to secure a cross-license or agree on a price for itself as it makes nothing.

Again, Appellant avers (paragraph 16, T. R. 3) that there is an outright assignment of the two groups of patents to New Wrinkle. Consequently there is no cross-license in this case, upon which to present a "two way" contract between New Wrinkle and any other company. The cross-license necessitated the retention of title in each manufacturer in the *Gypsum* and *Line Material* cases as the foundation for the "two way" contracts to fix the prices of the respective manufacturers. Chadeloid is not claimed by Appellant to be a manufacturer; it is only averred as the owner of a group of patents which it *assigned outright to New Wrinkle, Inc.*

Such transfer of title was not a cross-license and was not between competitors. It was an outright sale. The transfer of Kay & Ess to New Wrinkle was not to competitors because neither Chadeloid nor New Wrinkle were manufacturers. Hence, there was no reason for a cross-license or price fixing between competitive manufacturers as in the *Gypsum* and *Line Material* cases.

Lastly, the Appellant pleads the standard New Wrinkle contract, Exhibit C (T. R. 12), which shows on its face that it is a "one way" contract **directing, but not agreeing with the Licensee**, the price at which the Licensee is to sell. This "take it or leave it" position of New Wrinkle towards the Licensee is impressively confirmed by the provision that if the Licensee does not like this "one way" arbitrary fixing of his minimum price by New Wrinkle, he can cancel the contract and drop the whole matter.

This is in marked contrast to the "two-way" cross-license schemes of *Gypsum* and *Line Material* which would be rendered futile and pointless if one of the parties could

run out on the contract at will when the price was fixed.

The fact that New Wrinkle is not a manufacturer enables it to be perfectly independent in its "one way" direction in fixing the Licensee's price because it had no manufacturing business, as in the *Gypsum* and *Line Material* cases, to be injured by its action. New Wrinkle, Inc. was not a competitor of anybody and had no reason to fix the price for itself. That is the reason why its contract was presented as an accomplished fact to the industry to "take it or leave it."

Thus, the legal foundation, when you look at the contrasting facts in this case, as pleaded by the Appellant, in comparison with the facts of *Gypsum* and *Line Material* and *National Lead* and other similar cases, it will be seen that the facts in each Anti-Trust case are controlling and general questions cannot be decided, as sought by the Appellant, without considering the facts in each previously decided case and the facts in this case at bar.[1]

CHADELOID AND KAY & ESS NOT COMPETITORS.

Chadeloid is averred by Appellant to be only a patent owner in litigation with Kay & Ess, a manufacturer. There is no averment that Chadeloid was a manufacturer.

Therefore Chadeloid in its litigation with Kay & Ess was *a legal opponent, but not a commercial competitor.*

Appellant charges that the purpose of Chadeloid and Kay & Ess in assigning their respective patents to New Wrinkle, Inc. in settlement of the litigation in order to pro-rate the royalties from the combined patents was "in order to eliminate competition between them" (paragraph 15 complaint, T. R. 3).

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[1] *Chicago Board of Trade v. United States*, 246 U. S. 231, 238; *Appalachian Coals, Inc., et al. v. United States*, 288 U. S. 344, 360, 361; *Sugar Institute vo United States*, 297 U. S. 553, 600.

This legal conclusion or assumption, therefore, has no fact basis. In fact, as the complaint itself shows, there is no foundation for it, as Chadeloid was not a manufacturer in competition with Kay & Ess. If it had been, we must assume Appellant would have so pleaded it.

To the contrary, the complaint avers that the only conflict between them was patent litigation; "that Chadeloid only held patents," and that conflict was resolved by the *assignment* of both groups of patents to New Wrinkle, Inc., also a non-competitor and a non-manufacturer (paragraph 14 and paragraph 16, T. R. 3-4).

Factually, therefore, this allegation in this case as a support for Appellant's claim of an illegal conspiracy between competitors is refuted by the face of the complaint itself.

WHAT IS LEFT OF THE ALLEGED CONSPIRACY CLAIMED BY APPELLANT ON THE FACTS OF THIS PARTICULAR CASE?

What does this set of facts in this case leave of Appellant's claim of illegal price fixing in restraint of trade?

First, it says the license contract of New Wrinkle, Exhibit C, was offered to the trade at various meetings etc. This we admit. **It was offered: not negotiated.**

Second, it says that the provision that the license contract would not go into effect until a substantial group of manufacturers would sign up, we also admit. No prudent manufacturer or Licensor would put itself into the position of being committed to the contract involving the manufacture and sale of a new industrial finish unless the sales resistance and sales costs would be reduced by a group of competitors all recommending, advertising and selling the same finish on a comparable basis to produce volume

business for the Licensor. At the time these contracts were signed up, New Wrinkle had not yet put into effect its price control of its Licensees.

Third, it is obvious that the price control and its particular terms were not in issue with these companies because they could cancel if they did not like it and none of them could have any control over it because New Wrinkle announced that it was basing any price it would stipulate upon the published costs of labor and materials in turn based upon United States Government Department of Labor and Department of Commerce figures. As this represented the bulk of any price of an article selling at several dollars a gallon, it would be obvious that there was no room for negotiation of price between the parties. The contract itself, as pleaded, shows that only New Wrinkle, Inc., could fix the price for the Licensor and the Appellant pleads that was the contract put into effect.

Fourth, the following is conclusive against the Appellant's charge of any alleged conspiracy to agree on price. It rests its case on the *Gypsum* and *Line Material*, etc. cases in which uniformity of price must be agreed upon by both *cross-licensing* or *cross-contract* parties or otherwise this "two way" contract in which each party in competition fixes the price for the other. **That uniformity is an essential badge of evil in a "two way" contract.**

To the contrary, in a "one way" contract such as Exhibit C in which New Wrinkle, a non-manufacturer, directs the minimum price, **uniformity of the contract becomes the badge of legality and absence of restraint of trade.** *This is because any variation between Licensees of the terms of the contract would prefer one Licensee over another and give unfair competitive advantages to one or more Licensees against the others which would be re-*

straint of trade and not an equal base for competition.

Consequently, you will see the necessity to consider the facts in this case, ignored by the Appellant in its attempted arbitrary application of the holdings of this Court without crediting the sound, factual reasons for such holdings in the "Gypsum" and other cases which do not apply to other and different facts of this case.[1]

So much for the statement of facts and their importance in this case. In the following argument we discuss the application of the law to the state of facts in this case and point out the errors of assumption upon which Appellant premises its three questions for decision by this Court: these we have restated in terms of the facts admitted here by both parties, and as averred in Appellant's own Complaint.

OUTLINE OF THE ARGUMENT.

Basic Principles Established by This Court Upon Which Appellee Relies as the Foundation for Its Argument.

I. (a) A uniform contract of license from a patent holding company, a non-manufacturer, affiliated with a manufacturing company giving uniform terms to all Licensees is legal. *Automatic Radio v. Hazeltine Research, Inc.*, 339 U. S. 827, 829, 831; *Standard Oil Co. v. United States*, 283 U. S. 163.

(b) A patent owner may accumulate a large group of patents under which licenses are granted and there is

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[1] As Mr. Chief Justice Hughes said in *Sugar Institute v. United States*, 297 U. S. 553, 600:

> "We have said that the Sherman Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions. Thus in applying its broad prohibitions, **each case demands a close scrutiny of its own facts.** * * *". (Emphasis ours.)

nothing *per se* illegal. *Automatic Radio v. Hazeltine Research, Inc.*, 339 U. S. 827, 834; *Transparent-Wrap Machine v. Stokes and Smith Co.*, 329 U. S. 637.

(c) A combination of groups of patents that are conflicting may be placed in the hands of a single company and the income pro-rated between the former owners of their respective groups of patents. *Standard Oil v. U. S.*, 283 U. S. 163; *Temco v. Apco*, 275 U. S. 319, 328.

(d) A "one way" contract by which a patent owner licenses Licensees and fixes their price, but not his own price, is legal. *E. Bement & Sons v. National Harrow*, 186 U. S. 70; *U. S. v. General Electric*, 272 U. S. 476.

(e) A royalty based upon the amount of business done under a license is within the law. *Automatic Radio v. Hazeltine Research, Inc.*, 339 U. S. 827, 834.

(f) An assignment of a patent transferring its ownership outright for a consideration is fundamentally different from a license "* * * As a license passes no interest in the monopoly, it has been described as a mere waiver of the right to sue by the patentee,* * *" *De Forest Radio v. U. S.*, 273 U. S. 236, 242.

(g) A "two way" contract consisting of a cross-license by which competitive manufacturers license each other and thereby make their respective prices uniform by price control in each license is a violation of the Anti-Trust Laws and is outside the Patent Laws. *United States v. Line Material Co.*, 333 U. S. 287; *U. S. v. Gypsum*, 333 U. S. 364, 400, 401, 410; *U. S. v. National Lead Co.*, 332 U. S. 319, 335-351.

II. The *Gypsum* and *Line Material* cases are distinguished from the *Bement* and *General Electric* cases as the former are "two way" cross-license contracts constitut-

ing an agreement to fix the prices, whereas the latter cases employ a "one way" direction from the Licensor to Licensee fixing the price at which the Licensee sells, but no agreement on the part of the Licensor to maintain the same price. New Wrinkle, a non-manufacturing Licensor, falls within the latter category. *U. S. v. Gypsum*, 333 U. S. 364, 400, 401, 410; *U. S. v. Line Material*, 333 U. S. 287; *U. S. v. General Electric*, 272 U. S. 476.

III. New Wrinkle established its contract, Exhibit C, and offered it under the patents it owned without discrimination on equal terms to any manufacturer. **It did not fix its own price because it was not a manufacturer as it had nothing to sell on which to fix a price.** Therefore, there was nothing upon which it needed any negotiation with the Licensee. New Wrinkle's contract comes within the *Bement* and *General Electric* "one way" cases. Its contract is even more remote from any Anti-Trust violation because it had no manufacturing to price and protect by price. *Bement v. National Harrow*, 186 U. S. 70; *U. S. v. General Electric*, 272 U. S. 476. (Appellant's question No. 1.)

IV. The terms of the license contract govern its legality. The origin of the contract was in the settlement of the litigation between a non-manufacturer and a manufacturer by assignment of the entire interest in the two groups of patents to the non-manufacturer, New Wrinkle, Inc. **The uniformity of the agreements offered in a "one way" contract of the "Bement" and "General Electric" type was proof of legality as the contract did not discriminate between Licensees: the uniformity in a "one way" contract is used to prevent discrimination and restraint of trade, while the use of uniformity in the "two way" contract is indicative of an illegal plan to fix prices because uniformity**

is the foundation of such illegal, mutual price fixing action. *U. S. v. Gypsum*, 333 U. S. 364; *U. S. v. Line Material*, 333 U. S. 287; *U. S. v. National Lead*, 332 U. S. 319. The law encourages the widest possible use of patents in the public interest "to promote the progress of science and useful arts." *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corporation*, 340 U. S. 147. (Appellant's question No. 2.)

V. The fact that New Wrinkle, Inc. is a non-manufacturer does not deprive it of protecting its income from its patents under the doctrine of *Bement* and *General Electric* cases as the right to do so depends upon the protecting of the patent property *whether from royalty income or manufacturing*, and not upon the protection of mere commercial manufacturing rights. Additionally, there is far less danger of violating the Anti-Trust Laws by permitting a non-manufacturer to fix the price of his licensee under his patents because he is under no temptation to fix them to protect his own price structure. *Bement v. National Harrow*, 186 U. S. 70; *U. S. v. General Electric*, 272 U. S. 476. (Appellant's question No. 3.)

VI. There is no jurisdiction over New Wrinkle's license activities under the Anti-Trust Laws. First, New Wrinkle is not engaged in "commerce" because it does not manufacture or sell anything. It executes patent licenses only which are not "commerce" under the Anti-Trust Laws. Second, there is no jurisdiction because its activity is solely under the exemption of the Patent Laws. The Appellant's third question emphasizes that it claims New Wrinkle is not engaged in manufacturing or selling and therefore has nothing to protect in "commerce" and for that reason is not entitled to fix the price of its Licensee under the *Bement* and *General Electric* cases, which shows

that (a) New Wrinkle is not engaged in "commerce"; and (b) it is exempt from the Anti-Trust Laws because all it does is to function within the exemption from those laws of the Patent Laws. *United States v. Joint Traffic Assn.*, 171 U. S. 505, 567, 568, 573; *Hopkins v. United States*, 171 U. S. 578; *Anderson v. United States*, 171 U. S. 604; *U. S. v. Yellow Cab Co.*, 332 U. S. 218, 230; *Apex Hosiery v. Leader*, 310 U. S. 469.

ARGUMENT.

POINT I.

GENERAL PRINCIPLES ESTABLISHED BY THIS COURT UPON WHICH APPELLEE RELIES.

New Wrinkle Has the Legal Right to Grant Uniform License Contracts to All Manufacturers Alike.

It has been traditional for patent holding companies to offer uniform contracts of patent license to manufacturers who are competitive. This was again recently recognized by this Court in *Automatic Radio v. Hazeltine Research, Inc.*, 339 U. S. 827, 829, where this whole problem of licensing under patents was reviewed. This Court said:

> "* * * Respondent and its corporate affiliate and predecessor have for some twenty years been engaged in research, development, engineering design and testing and consulting services in the radio field. Respondent derives income from licensing of its patents, *its policy being to license any and all responsible manufacturers of radio apparatus at a royalty rate which for many years has been approximately one percent.* * * * The license agreement in issue, which appears to be *a standard Hazeltine license*, was entered into by the parties in September 1942, for a term of ten years. * * * " (Emphasis ours.)

The Terms of the New Wrinkle Contract Are Those Approved by This Court.

As in this case "Hazeltine does not even manufacture or sell goods; it is engaged solely in research activities." (page 831) and as in this case "there is no conditioning of the license grant upon the acceptance of another and different license" (page 831). This Court again called attention to the fact that the mere accumulation of patents, no matter how many, is not and of itself illegal. (See *Transparent-Wrap Machine Corp. v. Stokes and Smith Co.*, 329 U. S. 637.) And as to royalty based upon a percentage of the Licensee's sales this Court held "We hold that in licensing the use of patents to one engaged in a related enterprise, it is not *per se* a misuse of patents to measure the consideration by a percentage of the Licensee's sales." *Automatic Radio v. Hazeltine Research, Inc.*, 339 U. S. 827, 834.

New Wrinkle's Unusual Licensing Plan Discourages Restraint of Trade.

The logical and common sense way of reducing monopoly and decreasing restraint of trade was aptly stated by Mr. Justice Brandeis in *Standard Oil v. U. S.*, 283 U. S. 163:

> "If the available advantages are open on reasonable terms to all manufacturers desiring to participate, *such interchange may promote rather than restrain competition.*" (Emphasis ours.) (p. 171.)

And so this Court held that when the parties were trying to settle conflicting claims in litigation, to defeat their objective *there must be a definite showing of illegality*. That, we submit, has not been shown in this case—suspicion is an insufficient support for doing of justice.

The Settlement of Patent Litigation to Open All Patents to an Entire Industry Is Lawful.

In *Standard Oil v. U. S.*, 283 U. S. 163, a conflict had developed between four companies concerning the validity, scope and ownership of patents on the process of "cracking" gasoline.

> "* * * One infringement suit was begun; cross-notice of infringement, antecedent to other suits, were given; and interferences were declared on pending applications in the Patent Office." (page 168.)

These difficulties led to the execution of agreements cross-licensing the patents and providing for a division of royalties from Licensees. The Government brought suit under the Sherman Act, but this Court said:

> "* * * Where there are legitimately conflicting claims or threatened interferences, a settlement by agreement, rather than litigation, is not precluded by the Act. * * *" (page 171.)

In *Temco Electric Motor Co. v. Apco Mfg. Co.*, 275 U. S. 319, 328, an opinion by Mr. Chief Justice Taft, discussed this problem, recognizing the need for the Courts to encourage some adjustment of conflicting rights under patents. This is the same *Temco* case cited in *U. S. v. Line Material Co.*, 333 U. S. 287, 291.

The Absence of Cross-Licensing in New Wrinkle Contract is a Badge of Legality.

This Court has drawn the distinction between the "one way" contract of the *General Electric* case as contrasted with the "two way" cross-license scheme of *Gypsum* and *Line Material*. In the latter case Mr. Justice Reed said:

> "* * * While the *General Electric* case holds th .t a patentee may, under certain conditions, lawfully control

the price the Licensee of his several patents may charge for the patented device, no case of this Court has construed the patent and anti-monopoly statutes to permit separate owners of separate patents *by cross-license or other arrangements to fix the prices to be charged by them and their Licensee* **for their respective products.** Where *two or more patentees with competitive,* non-infringing patents combine them and fix prices on all devices produced under any of the patents, competition is impeded to a greater degree than where a single patentee fixes prices for his Licensees. The struggle for profit is less acute. * * * " (Emphasis ours.) (p. 311.)

An assignment of a patent, transferring its ownership outright, for a consideration is fundamentally different from a license "As a license passes no interest in the monopoly, it has been described as a mere waiver of the right to sue by the patentee,". Quoted with approval by Mr. Chief Justice Taft for a unanimous Court in *De Forest Co. v. United States,* 273 U. S. 236, 242. In the *Line Material, Gypsum* and *National Lead* cases we had cross-licenses between manufacturers who were competitors which developed a situation that frequently violates the Anti-Trust Law.

POINT II.

THE "ONE WAY" CONTRACT OF GENERAL ELECTRIC CONTRASTED WITH THE "TWO WAY" CONTRACT OF GYPSUM AND LINE MATERIAL.

New Wrinkle and Chadeloid Were Not Manufacturers; and Not Competitors of Kay and Ess.

The Appellant relies upon support of the *Gypsum* and *Line Material* cases in its Number 1 question. Here again, the difference of the facts and the circumstances of the parties spell the difference between the legal *General Electric* method and illegal *Gypsum* and *Line Material* method of doing business.

Let us look at the facts of the New Wrinkle case. Chadeloid was a mere patent holding company; it is not averred to have been a manufacturer and therefore not a competitor of Kay & Ess who was a manufacturer. These two non-competitors but *opponents in patent litigation*, formed New Wrinkle, which is also a patent holding company and not a manufacturing company. The acquisition of the patents by New Wrinkle was by absolute assignment for its stock.[1] There were no cross-licenses and there was no occasion for the cross-licensing because Chadeloid and New Wrinkle were not manufacturing.

New Wrinkle's Only Objective: Royalty Income From Patents.

As New Wrinkle had no objective to gain but income from the patents and in order to do so it wanted to protect its property rights to get the most royalty from the largest number of Licensees who were competitors. It therefore adopted a simple license like that of "*General Electric*,"

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[1] The legality of an assignment of a patent for any valuable consideration has been upheld by this Court. *Transparent-Wrap Machine Corp. v. Stokes Co.*, 329 U. S. 637.

a "one way" contract, by which it told the Licensee the price below which it could not sell. New Wrinkle did not agree with the Licensee—there was no occasion to do so.

New Wrinkle's Interest Was Patent Royalties: Not Price Fixing for Itself.

It is significant that New Wrinkle received nothing from the Licensee except his money. The amount of money New Wrinkle receives depends upon how much the Licensee sold. The extent to which the Licensee can afford to push its sales depends upon first, whether its operation is profitable; and, second, whether its price is the lowest possible, consistent with profit, in order to get the maximum sales.

New Wrinkle's interest is likewise protected by having a minimum price control which will enable the Licensee to accomplish the foregoing objectives and produce the maximum royalties.

Uniformity of License Contract Only Important When Cross-Licenses: Then it Becomes a Matter to Determine Illegality.

There is no need for a cross-license or price fixing agreement for New Wrinkle had no manufacturer's rights to protect by such a scheme. That is why the license contract contains no reference to reciprocal grants under the Licensee's patents as in *U. S. v. Gypsum*, 340 U. S. 76, 78, 93, 94. In this *Gypsum* case the Court prohibited reciprocal grants. It is for the same reason that uniformity of contract means in the *General Electric* and *New Wrinkle* cases evenhanded competition; but in the *Gypsum* and *Line Material* cases it was the heart of the conspiracy *because, unless the contracts were uniform, the conspiracy would fail in its objective of uniform, reciprocal prices.*

POINT III.

THE WRINKLE CONTRACT CONTROLS ITS OPERATION.

New Wrinkle Uses a "One Way" Contract; Its Sole Link With Its Licensee Manufacturer Was Its License.

The Wrinkle contract is legal *per se* under the doctrine of the *General Electric* case. According to Appellant's allegations, as we understand them, it was drafted and then offered to the industry. Even if it had not been first drafted, but had been the subject of negotiation with the Licensees, and then drafted, the situation would have been no different because there is no violation of law in negotiating a legal agreement.

As a matter of fact, there was nothing that needed negotiation with the Licensee. New Wrinkle was only securing a small royalty and had the privilege of specifying the minimum price. The Licensee, on the other hand, entered into no contract by which it gave away any property to New Wrinkle. It could cancel the contract any time it pleased; it secured only a non-exclusive license. **It gave no cross-license or patent rights to New Wrinkle; it had no business relationship with New Wrinkle because New Wrinkle was not a manufacturer and had nothing in common with the Licensee.**

In the *Gypsum* and *Line Material* cases the situation was far different. Each party wanted something from the other of commercial, competitive nature to soften the rigors of competition which the parties sought to suppress by using uniform contracts to secure uniform prices. Additionally the parties endeavored to control the organization of the industry and unpatented materials. No such conditions exist in this case.

The absence of manufacturing by New Wrinkle is a badge of legality: this case is further from monopoly than the "General Electric" case.

In the *General Electric* case, General Electric fixed the price of the Licensee, as we understand it, at the price at which General Electric was going to sell. Certainly that was the case in *United States v. Gypsum Company*, relied upon by the appellant, for this Court said:

> "As in the previous contracts, United States v. Gypsum reserved the right to fix the minimum price at which each licensee sold wallboard embodying the licensor's patents, *the licensor agreeing that such minimum price would not be greater than the price at which the licensor itself offered to sell.*"

There is no such provision in the Wrinkle Contract. There was no need for it, because Wrinkle was not a manufacturer. There is nothing in the Wrinkle Contract that refers to New Wrinkle's price action because there was none.

Thus, the New Wrinkle Contract is even more remote from the Anti-Trust Laws than the General Electric contract and, of course, the Gypsum contract in view of the absence of any agreement with the licensee as to the licensor's price, either as a guide, a limitation or as a matter of identity by agreement. The very issue of Anti-Trust violation by price fixing which was the heart of the *General Electric* and *Gypsum, Line Material*, etc., cases is absent from the New Wrinkle Contract.

Absence of New Wrinkle's Commercial Intent in Manufacturing is a Guarantee of Its Disinterest in Mutual Price Control.

New Wrinkle's price control had no bearing upon its operations outside of the patents, because it had no property or business except in the patents.

When you examine the difference in facts, you will perceive the misleading character of the phrasing of

Appellant's question number 1, because it ignores the fact of the complete absence of a manufacturing Licensor—there was no motive or foundation for a "two way" contract. Appellant tries to fit the New Wrinkle case with different facts into a rigid pattern of an entirely different type, just because the Appellant finds what it believes are some helpful statements made by this Court when this Court was referring to an entirely different set of facts.

The Appellant looks at the form of words and not to the substance of the transaction as required in Anti-Trust cases.[1]

POINT IV.

THE TERMS OF THE LICENSE CONTRACT GOVERN ITS LEGALITY: THE BACKGROUND OF FACTS DEMONSTRATE ITS FULL COMPLIANCE WITH THE ANTI-TRUST LAWS.

New Wrinkle's Objective Was the Maximum Enjoyment of the Patent Grant: It Had No Interest in "Commerce."

These features of the New Wrinkle contract demonstrate on its face that its purpose and its result was to secure the maximum enjoyment of the patent grant without stepping outside of the Patent Law.

If there is to be a monopoly of sound patents, then the greater the dilution by licensing with the maximum number of Licensees, the greater the patent serves the public interest. *Great A. & P. Tea Company v. Supermarket*, 340 U. S. 147.

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[1] *Chicago Board of Trade v. United States*, 246 U. S. 231, 238; *Appalachian Coals, Inc., et al. v. United States*, 288 U. S. 344, 360, 361; *Sugar Institute v. United States*, 297 U. S. 553, 600.

New Wrinkle's License Devoted Solely to Patent Matters.

First, it owned the patents. Second, by owning outright all of the important patents in this industry on wrinkle finishes, *it could give to the Licensee immunity from patent litigation which would encourage the Licensee to make the necessary investments in laboratories, plants and equipment to manufacture wrinkle finishes.* Third, the Licensee secured immunity from all future patents of New Wrinkle without any increase in royalty. Fourth, the Licensee did not give up its liberty of action as it could retire from the contract because it could get out of it at will, if it desired to compete without reference to the contract and its patents. Its acknowledgment of the validity of the patents terminated when it dropped the contract. Lastly, it was protected in the price fixing of the minimum price by first knowing what the price was before being committed; then having the assurance that the price was not arbitrary because it was based upon Government figures to insure normal costs of operations without loss; and then it could cancel before the price control could go into effect; or upon three months notice after it went into effect; and finally, if the royalty was changed, the Licensees would be treated fairly by having the same terms.

New Wrinkle License Based Upon the Form of License Approved in Decrees by This Court.

A study of this Court's decisions involving decrees in Anti-Trust—Patent cases shows that the basic principles for operation under patents you have laid down in your decisions have been followed in this license—non-exclusive license to any manufacturer, subject to cancellation by the Licensee at any time; and to this we have added a Licensor who is not a competitor manufacturer so any minimum

price for Licensee fixed by the Licensor could not possibly be a conspiracy as the Licensor had no price to make for its own goods.

The Chadeloid-Kay and Ess-New Wrinkle Settlement Was Based Solely on Patent Royalty Income.

This contract also contains, in its price fixing provision in paragraph 7 means of preventing a company from conspiring on prices for commercial competitive purposes because price is based upon economic conditions of cost of labor and materials in published Government figures.

You will note that Chadeloid, not a manufacturer, but a patent holder, was only interested in patents and income from patents. When it settled the litigation, it secured the larger portion of the stock from which it would get the major share of dividends from royalties. New Wrinkle, Inc. was patterned upon Chadeloid's method of doing business, where the primary interest was in patents and not in manufacturing.

Kay & Ess, the manufacturer, had to take a license from New Wrinkle as it was required to pay royalties from which Chadeloid got its major share. *Royalties were Chadeloid's sole interest.* Kay & Ess took New Wrinkle's license like anyone else so that all manufacturing Licensees would be on the same basis, and Chadeloid would get its share of New Wrinkle royalties.

Appellant Disregards the Critical Factual Differences Between Its Authorities and the Facts of This Case.

If you refer to the second question presented by the Appellant you will note again an effort to avoid a consideration of the *controlling facts which are omitted also from the second question.* Appellant seeks support for its expected answer, by so framing its question, from *United*

States v. Line Material, 333 U. S. 287 and *United States v. Gypsum*, 333 U. S. 364. Its position is that this Court held that the Patent Law does not sanction licensing by two patent owners, one a non-manufacturer, who have assigned their patents outright to a jointly owned non-manufacturing company under an arrangement giving to the new company, the new patent owner, the authority to grant price fixing licenses under the patents of both.

But that was not what this Court held in *Line Material* because that statement omits the critical facts which are the difference between illegality and legality. In the *Line Material* case two manufacturers not only cross-licensed one another, but **conspired to agree upon the price** *because both were manufacturers each attempting to take care of their commercial businesses under the guise of patent licensing.* There is no such reciprocity between Chadeloid and Kay & Ess as Chadeloid was not a manufacturer and therefore there was no such cross-licensing.

Kay and Ess was Forced to Take a Standard License so Chadeloid Could Get the Major Share of its Royalties.

The formation of New Wrinkle took the power from Kay & Ess to do what it pleased. Chadeloid, the non-competitor and non-manufacturer, **could put the brakes on Kay and Ess' liberty of action under its own patents so assigned to New Wrinkle.** Chadeloid had the largest stock and financial interest at stake.

As a part of the settlement Chadeloid required Kay & Ess to pay royalties to New Wrinkle so that it would secure its share of New Wrinkle's operations in compensation for turning over its broad patents to New Wrinkle. That is why Kay & Ess had to take a license from New Wrinkle like anybody else. The large interest of Chadeloid

in New Wrinkle, the major financial interest, demanded such impartial action by New Wrinkle so it could get Kay & Ess royalties.

Thus the Appellant's effort to say that there is no difference between *Line Material* and this case in the absence of cross-licensing must fail because the basic feature of *Line Material* was the price fixing agreement between *two competitive manufacturers* in a "two way" *cross-license* contract which they *both* used as a basis for their own and the rest of the industry combining illegally by mutuality of reciprocal price fixing.

Appellant rests its case on the proposition that a Licensor must be a manufacturer to have price control.

May we suggest this: if this Court upholds the Appellant's position that only a manufacturer ~~can have~~ a legal patent price control, **then the only way we can purge ourselves would be to go into manufacturing. Such a condition in a decree we submit would not be proper.**

POINT V.

THE FACT THAT NEW WRINKLE IS NOT A MANUFACTURER DOES NOT DEPRIVE IT OF THE RIGHT TO FIX THE PRICE FOR ITS LICENSEES UNDER THE GENERAL ELECTRIC CASE.

The Basic Principle of the General Electric Case is that a Patent Owner Can Protect His Income from Patents, Whether Manufacturing or Royalty Income, by Fixing His Licensee's Minimum Price.

This question is that raised in question No. 3 of the Appellant. Appellant is referring to the language of this Court in the *General Electric* case, 272 U. S. 476, 490, which says the right of a patentee to fix the minimum price of its Licensee is because "the price at which his Licensee

will sell will necessarily affect the price at which he [Licensor] can sell his own patented goods."

Stated another way, a patentee has the right to protect his patents, his income from his patents and his business under patents, by fixing the Licensee's minimum price. *In principle, there is no distinction.*

With that rule we have no quarrel, as we claim the right to fix the Licensee's price for exactly that reason, namely, New Wrinkle has grave property interests in this large group of patents from which it derives substantial royalty income (its only income) that will be affected if the Licensees sell at such low prices, that the Licensees would not profit due to the unlimited opening of the patents to the competition of everybody. That would necessarily affect their volume of sales, then the volume of royalties and their lack of business which would in turn injure the return of royalties to New Wrinkle.

In principle, there is no difference whether a Patentee is protecting his patent right under which he is manufacturing or protecting income from his patent rights under which he is licensing. Both situations come within the principle established by this Court in the *General Electric* case that the Patentee-Licensor has the right to fix his Licensee's price to protect his business under his patents.

The Appellant itself pleads that the Appellee's royalty of five cents a gallon on millions of dollars of sales is substantial (T. R. 2, paragraphs 10 and 11). This brings this case within the rule stated in the *General Electric* case—in order not to violate the Sherman Act, the royalty must be **"normally and reasonably adopted to secure pecuniary reward for the Patentee's monopoly."** *U. S. v. General Electric*, 272 U. S. 476, 490. (Emphasis ours.)

Appellant's Position that the "General Electric Case" Only Applies to Manufacturing Patentees Is Unsound in Law.

We might add that the Appellant's position is also unique in that it means, if it is correct, that only those owners of patents who have enough money to go into business to manufacture could enjoy this valuable right of controlling the price of the Licensee.

We have never, as yet, in the United States, made the size of a man's pocketbook a condition for enjoying his legal rights under the Patent Law. It is unusual that the Government of the United States would take such a position when its duty under the Anti-Trust Laws is to enforce them to give us equality of competition between men of different means; and not preferences in competition according to the size of the pocketbook of the competitors. This Court has never made such a distinction. This illustrates the unsound position of the Appellant in this matter. So much for the third and last question of the Appellant.

There Has Been No Conspiracy to Unreasonably Restrain Commerce.

No Licensee has been restrained or forced to take a license contract—its terms provide that the Licensee can take it or leave it at will.

No manufacturer and no sale is unreasonably restrained by the mere fixing of the Licensee's price by the Licensor—this Court has so said.

There is no conspiracy to restrict trade in Wrinkle finishes because there has been only an open agreement by Chadeloid, the non-manufacturer, and Kay and Ess, the manufacturer, to settle their litigation by combining

patents and agreeing that the new holding company should license the industry in a "one way" license, open to anyone, with equal treatment to all.

There is no proof of conspiracy just because New Wrinkle, a non-manufacturer, with no price of its own to be fixed, has offered to a group of manufacturers a single, uniform license contract with sole power to direct a minimum price by the Licensee.

No agreement to unreasonably restrain between the Licensor and the Licensee has been shown by any factual averment—*all there is are mere legal conclusions and suspicions without factual support.*

To the contrary, the facts pleaded by the complaint positively rebut any conspiracy to restrain trade unreasonably because of the fact that New Wrinkle was not a manufacturer. It, therefore, did not even have any basis for fixing a price based upon its own manufacturer as in the *General Electric* and other cases. Again, New Wrinkle had no reason to fix a price to protect a manufacturing business. The only reason for New Wrinkle to fix the lowest possible price consistent with the dilution of its monopoly in order to insure that its Licensees would operate profitably, but at the lowest possible price to insure the maximum of sales. There was no agreement on price of a Licensor to fix prices for the Licensees the same as it was making for itself.

Still again there is a positive prohibition of conspiracy because, instead of using a manufacturer-licensor's own price as a standard of fixing the Licensee's price, in this case the non-manufacturer, New Wrinkle, announced that it would use the Government figures on costs and labor materials which were the predominant factors in fixing the price and which Government figures were independently arrived at by the United States Government and impos-

sible of being changed by any conspiracy between the Licensor and Licensee.

Therefore, not only do we have in this case the absence of the factors of conspiracy, but we have the positive safe-guards based upon the fact against any conspiracy to reasonably restrain trade being effectuated.

This leaves us with a complaint with its admitted facts, in which nothing is factually pleaded to support a scheme to unreasonably restrain. This leaves Appellant's unadmitted suspicions and legal conclusions completely devoid of any factual allegations to support them.

REBUTTAL TO GOVERNMENT'S ARGUMENT.

In the "Statement of Facts" and elsewhere, the Appellant's brief persists in assuming that an allegation by it of its conclusion that there is a conspiracy was admitted as a fact by our motion to dismiss. This is not so as no such admission was made on the argumentative conclusions of the Appellee. The Appellant seeks to prejudice this case by such typical references as "the conspiracy," "the co-conspirators have been engaged in a conspiracy," "pooling of patents to eliminate competition between themselves," etc., at pages 4, 5 and elsewhere throughout the brief.

It seems to us the legal interpretation of the admitted facts can be safely left to this Court and no such admissions as to legal conclusions will be implied in a motion to dismiss. *Meccano, Limited v. John Wanamaker*, 253 U. S. 136, 141, 142.

The Appellant first assumes a conspiracy to restrain interstate commerce as a fact: and then argues "Participation in such a conspiracy is therefore a violation of the section irrespective of whether the conspiring party is en-

gaged in the interstate trade subjected to restraint or in any interstate trade" (p. 15 Appellant's brief), ignoring:

1. That the exercise of the legitimate right under the Patent Law to license under patents with a price control is exempted from the foregoing rule so long as the Appellee does not step outside of the Patent Law.

2. The Appellant does not charge New Wrinkle has done otherwise than license with a patent control—so where is the conspiracy? Certainly the offering of legal patent licenses already fixed as to terms before the license fee is approached is not a conspiracy—it's only the exercise of a legal right.

3. Patent licensing with a price control has been held by this Court as coming within the Patent Laws and, therefore, not within the Anti-Trust Laws.

4. Such patent licensing is not "commerce" within the meaning of the Anti-Trust Statute. If we step outside of the patent licenses and use it to control other matters, then only does the issue of "commerce" and conspiracy arise.

The Appellant admits this Court has held "this restriction on the licensee's sales price comes within the implied terms of the patent grant. *United States v. General Electric Co.*, 272 U. S. 476. The ground of decision was that this limitation is 'normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly,' in that it enables the patentee to obtain as a reward the return coming from multiple exploitation of the exclusive rights conferred by his patent, without impairing his opportunity to obtain the reward which comes from selling the patented product himself at whatever

price he thinks will bring the greatest return. 272 U. S. 476, 489-490." (pp. 16, 17 Government brief.)

Now, where does the Appellant say that New Wrinkle departs from that rule and the conspiracy begins? It says "Price fixing is the core of the conspiracy alleged in the complaint" (p. 20), but this Court has said that this in itself, without more, is legal under the Patent Laws.

What more did Chadeloid, a non-manufacturer and owner of basic patents, do with Kay & Ess, the manufacturer, with "practical" patents?

These non-competitors assigned the patents to a non-manufacturing patent owning company, New Wrinkle. They agreed to a form of usual non-exclusive universal license. Kay & Ess, the manufacturer, required protection in its manufacturing and sales for this widespread licensing of its patents pursuant to the decision of this Court. Therefore, a price control was put in the license to protect the Kay & Ess manufacturing interests and Chadeloid's interests in getting royalty.

Was it an illegal conspiracy outside of the Patent Laws for Kay & Ess to make this requirement? This Court in the *General Electric* case has said "no." Was it a conspiracy to offer such a pre-arranged universal license to all comers alike? This Court has said "no" in *Automatic Radio v. Hazeltine Research, Inc.*, 339 U. S. 827, 829, 831.

Can it be, as Appellant charges (bottom of p. 20, top of p. 21, Government brief), that it is an illegal conspiracy to approach prospective licensees with a contract already fixed in its terms of patent license with a price control practice. A mere offering to license under what this Court has said is a legal contract cannot be an illegal conspiracy.

The offering of such a license at a low royalty rate which requires the volume of many producers to make a satisfactory return can certainly be made if there are

enough manufacturers taking it to make the dilution of the monopoly worth-while at such rates. Can this reasonable precaution be challenged by the legal conspiracy question? We think not.

Can the offering to all manufacturing such a contract to take or leave as they please be an illegal conspiracy? Where there is no agreement by the Licensor to fix reciprocal, "two way" prices we think not. New Wrinkle was not a manufacturer nor was Chadeloid.

Now, Appellant finds itself in its brief in a serious conflict of positions. it finds in its Point II "The fact that in this case price limitation is incorporated in license agreements made by a patentee who did not make or sell the patented product makes the doctrine of the *General Electric* case inapplicable." (p. 13 Government brief.)

But on pages 21, 22, it takes the position that New Wrinkle reserves the right to manufacture and, therefore, **should be treated as a manufacturer** who licenses and will also adhere to the same price so fixed by it. From that statement the Appellant bases its whole argument of conspiracy.

Obviously, if New Wrinkle is to be given the status of a manufacturer, Appellant's position under its Point II that New Wrinkle's conduct is not justified must fall under the *General Electric* case. And, certainly, the Appellant's Point I must fail because it states "New Wrinkle has never undertaken to make or sell wrinkle finishes." (p. 22 Government brief.) Therefore, it had no price of its own to protect and during its life of fourteen years has had none—therefore, there is **no fact foundation for a conspiracy to illegally agree on prices.** Point II recognizes this as the Appellant's basic problem when it tries to show that New Wrinkle, a non-manufacturer, is not entitled to the *General Electric* case because of that fact.

The fact is New Wrinkle is not a manufacturer and has never been. It has had no price of its own on commercial operations to protect.

The question raised by Point I is moot. No facts are pleaded to raise the issue. As the facts have stood for fourteen years New Wrinkle is not a manufacturer and its license contract is a "one way," *General Electric* type of contract of patent license.

However, if this Court finds that New Wrinkle does have the status of a manufacturer, Point II of Appellant fails (p. 25). In such an event if the Court so finds, the answer to Appellant's claim in Point I that Wrinkle agrees that, if it ever did manufacture, it would observe the minimum prices of the Licensee is this:

The retaining of such a right in the New Wrinkle license contract as a manufacturer-patentee is legal under the doctrine of this Court that "When the patentee licenses another to make and vend, and **retains the right to continue to make and vend on his own account, the price at which his licensees will sell will necessarily affect the price at which he can sell his own goods** (*General Electric Company* case).

The retention of the right by a patent owner to sell at an established licensee price, in the event of manufacturing, has, therefore, been approved by this Court as coming within the Patent Law. Here again this point fails by the Appellant's own citation (p. 26) of the above case.

Before leaving Appellant's Point I, better say briefly that New Wrinkle regulations cover only those prices necessary to be of equal treatment to all licensees because of the varying types of wrinkle finishes into which various colors and other characteristics are incorporated under the various patents—such finishes are not a single ended

product. There is no attempt to control the commercial businesses of the licensee outside the patents. The provisions are to prevent the licensee cheating on his price under the patent.

Appellant cites *United States v. Vehicular Parking, Ltd.*, 54 F. Supp. 828, to the effect that the *General Electric* case does not apply to a patent holding company independent of competitive manufacturers. The facts of the *Vehicular* case, however, show that the holding company was merely a combination of competitive manufacturers who joined together to control under their patents, by a system of licenses, the industry, both patented and unpatented. These were competitive manufacturers who thus established by their licenses a "two way" contract and fixed the prices by such means by agreement.

This is wholly different from the instant case where the non-manufacturing Chadeloid dealt with Kay & Ess, the manufacturer, to settle litigation which had already arisen. There was no contract between competitive manufacturers as Chadeloid was not a manufacturer. All that was done was to open up to anyone the Wrinkle patents with a price control. The *Vehicular* case is squarely within the class of such cases as *Masonite*, *Line Material* and *Gypsum* and does not support the Appellant's claim that patent holding companies are *per se* in violation of the law.

Point III charges conspiracy based upon a partial statement of the facts in this case. Appellant's brief (p. 29) says: "As a result of the negotiations, the two patent owners entered into a contract which provided for organizing New Wrinkle, assigning their patents to it, and the granting by it of price-fixing licenses under these patents (par. 16, R. 3-4)."

The Appellant fails to state this was a patent impassé case between the non-manufacturer, Chadeloid, and the

manufacturer, Kay & Ess, who were forced to such a solution in order to open all patents to use from which the parties could derive royalties pro rata. Such a solution was approved by this Court in *Standard Oil v. United States*, 283 U. S. 163.

"We submit that a combination thus to use the patents of two patent owners for the purpose of price fixing is beyond the scope of the monopoly" says the Appellant in its brief. Here again the Appellant states a generality hoping to come within the "two way" contract of *Line Material* and *Gypsum*. It ignores the fact that those cases were between two or more manufacturers who wished to fix their respective prices by illegal agreement, control unpatented materials, etc.

Here, to the contrary, one non-manufacturer and a manufacturer were endeavoring to secure a reward from their patents "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly." *United States v. General Electric Co.*, 272 U. S. 476, 490.

There was no agreement "to enhance the value of his own trade agreement by eliminating or impairing competition" because the purpose was to open to all for competition. The price control did not affect either Chadeloid or New Wrinkle, who did not manufacture. The price control was essential to the full enjoyment of the patents thus consolidated so they could be enjoyed by all other manufacturers. Kay & Ess became just another licensee. Its percentage of royalties was its purely patent compensation.

This set of facts is far different from the conditions in the *"Masonite"* and other cases that sought to use the patents as a vehicle of a "two way" agreement where the primary purpose was commercial organization of an industry, patented and unpatented. There is no cross-license between manufacturers here as in *Line Material*, *Gypsum*,

etc., as a subterfuge for "two way" price fixing between manufacturers. This case at bar differs fundamentally from *Standard Sanitary vs. United States*, 226 U. S. 20, because the subterfuge there was a weak patent situation assigned to a trade association owned, controlled and dominated by all the licensees—a mere subterfuge or illegal agreement.

New Wrinkle is not owned and dominated by a group of licensees.

Appellant suggests that we change the facts (its brief p. 32), and assume that Kay & Ess and Chadeloid have cross-licensed one another and one of them as the agent for the other granted to the licensee licenses, ignores the fundamental facts in this case.

First, Chadeloid was not a manufacturer and cross-licensing it was of no particular interest to it. It had nothing under which the cross-license would have been of any value.

Second, this suggestion incorporates the illegal feature of two competitive manufacturers (non-existent here) entering into a "two way" contract by agreement on prices under the subterfuge of patents to protect their respective manufacturing interests.

Third, it incorporates continuing ownership by the respective parties by cross-licensing which is not in this case.

This is not a question of New Wrinkle doing individually what the parties could not do directly. To the contrary, if Kay & Ess had bought the patents of Chadeloid, a non-manufacturer, and then followed the *General Electric* plan, there is no question of illegality. Likewise, if Chadeloid had bought the Kay & Ess patents, then it would have had the right to license and fix the prices in a "one way" contract.

Hence, there is no difference that each company parts title by assignment to New Wrinkle as a means of pro-rating the royalty return and exercising the power of any patent owner in a "one way" contract. This solution was approved in *Standard Oil vs. United States*, 283 U. S. 163.

The distress of Appellant in attempting to change the facts is apparent. There is no subterfuge here—there is no combination of manufacturers working under the guise of a manufacturer dominated trade association or cross-licensing of patents between manufacturers or mere substitutions of a corporation dominated by a group of manufacturers. We agree the Sherman Act "is aimed at substance rather than form." *United States v. Yellow Cab Co.*, 332 U. S. 218, 227. We rely upon that doctrine and do not agree to this theoretical substitution of facts now presented to this Court by the Appellant in an effort to get away from its difficulty.

The case of *United States v. General Instrument Corp.*, 87 F. Supp. 157, is not in point—and the subterfuge was apparent because the corporation was formed by a group of competitive manufacturers. In this case Chadeloid was not a manufacturer and not a competitor commercially with Kay & Ess—**the commercial competition does not enter this case on its own facts.** The *General Instrument* case was a mere subterfuge for a "two way" contract between competing manufacturers.

Point IV (p. 36 Government brief) of the Appellant says it is immaterial whether New Wrinkle was engaged in manufacturing and, therefore, in commerce—this is contrary to its position in Point I (pp. 21, 22).

Appellant ignores the fact that Appellee comes within the exception and exemption of the Patent Laws. It is only when a litigant is outside the Patent Laws that the rule it invokes in Point IV arises to consideration.

We raise the issue of no "commerce" and of no manufacturing by New Wrinkle (admitted by Appellant) as showing no "commerce" called for by the Anti-Trust Laws as one of the elements proving that New Wrinkle activities were solely under the Patent Laws pursuant to the *General Electric* case. Appellant has failed to pursue our point as it did below.

We find it unnecessary to take the "straw man" position set up by the Appellant in Point IV (pp. 15 and 36), that because there was no interstate commerce you can violate the Anti-Trust Laws, but we do say that the absence of such interstate commerce plus the sole use of the Patent Laws justifies our conduct and shows that we have not stepped beyond the Patent Laws.

The cases cited under Point IV need no further comments as they are not applicable to the present situation.

POINT VI.

NEW WRINKLE BY ONLY ISSUING PATENT LICENSES AND NOT MANUFACTURING IS NOT ENGAGED IN "COMMERCE" TO BRING IT WITHIN THE ANTI-TRUST LAWS: PATENT LICENSES ARE EXEMPT FROM THE ANTI-TRUST LAWS BOTH BECAUSE CONTRACTS ARE NOT "COMMERCE" AND BECAUSE PATENT LICENSES PER SE ARE SOLELY WITHIN THE PATENT LAWS.

It has been long held in numerous cases that so long as Congress has enacted statutes exempting patents from the operation of the Anti-Trust Laws, one who stays within the Patent Laws is exempt from any action under the Anti-Trust Laws. Conversely, if one steps outside of the Patent Laws he is subject to the Anti-Trust Laws provided what he does is "commerce."

First, New Wrinkle, whose sole business is in the granting of patent licenses, is within the Patent Law. On that ground alone, it is not subject to the Anti-Trust Laws.

Secondly, the mere entering into contracts across state lines is not in itself, irrespective of the Patent Laws, engaging in "commerce" within the meaning of the Anti-Trust Laws.

It is significant that when this Court found that the practice of insurance violated the Anti-Trust Laws in *U. S. v. Underwriters Assn.*, 322 U. S. 533, a subsequent enactment by Congress of a law exempting insurance from the operation of the Anti-Trust Laws, for a period in the same manner that patents are exempted, this Court's decision that insurance was within the Anti-Trust Laws, was suspended. The Patent Laws derive their authority under Congressional enactment from the Constitution and the Anti-Trust Laws derive their authority under the Commerce clause of the Constitution upon which the Anti-Trust statute has been premised. Both laws have constitutional origin of equal dignity. So long as one stays within the purview of his particular law he cannot be interfered with by the other law.

The logic of our position is further demonstrated by the following authorities. Patents are just as exempt in their use by issuing patent licenses as labor is exempted when acting within the purview of labor laws; and the labor contracts are exempt from the Anti-Trust Laws because of this congressional enactment just as patent license contracts are exempt under Congressional exception by the Patent Laws. It is true in both cases that the issuance of such contracts may ultimately initiate or control the movement of the goods in "commerce" or across state lines, but this Court has held that such contracts are not "commerce" and **are within the exemptions Congress has thrown around these special fields.** Indeed, Congress three times has nullified the decisions of this Court putting labor under the control of the Anti-Trust Laws.

We submit the following authorities are clear support for the proposition that patent licenses are exempted from the Anti-Trust Laws because within the Patent Laws; and secondly, mere contracts are not "commerce" coming within the Anti-Trust Laws.

We marshal the following propositions and their supporting authorities as the foundation of our later argument.

I.

The Anti-Trust Statute is based upon interstate commerce only:

Apex Hosiery Company v. Leader, 310 U. S. 469;
Atlantic Cleaners & Dyers v. United States, 286 U. S. 427;
Anderson v. United States, 171 U. S. 604.

Interstate commerce "is an intensely practical concept drawn from the normal and accepted course of business."

United States v. Yellow Cab Co., 332 U. S. 218, 231 (citing *Swift & Co. v. United States*, 196 U. S. 375, 398; *North American Co. v. S. E. C.*, 327 U. S. 686, 705).

"The Sherman Act was enacted under authority of the commerce clause and is necessarily of no greater dignity than that clause. * * *"

Washington Brewers Institute v. United States (C. C. A. 9), 137 F. 2nd 964, 967.

II.

(a) Merely licensing under the Patent Law is not engaging in commerce. It is a mere legal right to enjoy the

Patent Statute as a matter of law and not a matter of commerce:

"* * * It is true that the mere making of the lease of the machines is not of itself interstate commerce. * * *"

United Shoe Mach. Co. v. United States, 258 U. S. 451, 465;
Ware & Leland v. Mobile County, 209 U. S. 405, 411-13;
Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 253;
Hill v. Wallace, 259 U. S. 44, 69;
Chicago Board of Trade v. Olsen, 262 U. S. 1, 32-3;
Moore v. New York Cotton Exchange, 270 U. S. 593, 604;
Hopkins v. United States, 171 U. S. 578, 588-9, 602.

(b) **A matter of law cannot be a matter of commerce:**

"The question for the courts, however, is not economic, but wholly legal, to wit, the true interpretation of the law as enacted by Congress."

Paramount Pictures v. United Motion Pictures T. O. (C. C. A. 3), 93 F. (2nd) 714, 719;
Industrial Association of San Francisco v. United States, 268 U. S. 64;
Levering & Garrigues Co. v. Morrin, 289 U. S. 103;
United Leather Workers v. Herkert & Meisel Trunk Co., 265 U. S. 457;
Local 167 v. United States, 291 U. S. 293;
United States v. Hutchinson, 312 U. S. 219;
Associated Press v. Labor Board, 301 U. S. 103.

(c) Manufacturing and selling or entering into commercial activities may be commerce, but *a patent license*

under the law does not constitute doing business. Patent licenses may relate to things or events in other states than that of their execution, but they do not contain any obligation to engage in any form of interstate commerce.

Ware & Leland v. Mobile County, 209 U. S. 405;
Western Live Stock v. Bureau of Revenue, 303 U. S. 250.

(d). Any dealings between the Kay & Ess Company and New Wrinkle were in the State of Ohio and were not interstate commerce.

Hopkins v. United States, 171 U. S. 578;
United States v. Hutchinson, 312 U. S. 219;
Atlantic Cleaners & Dyers v. United States, 286 U. S. 427.

(e) These contracts of license do not cause any movement of goods or affect the sale of goods as between the licensor and licensee. The act of making any contract which does not stipulate for the performance of an act or transaction of interstate commerce is not in itself interstate commerce. This has been held to be true even though the contract be effected by exchange of communications across state lines;

New York Life Ins. Co. v. Cravens, 178 U. S. 389;
Ware & Leland v. Mobile County, 209 U. S. 405;
New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495.

"The mere fact that an anticipated local transaction causes a movement in interstate commerce is not sufficient to constitute the local transaction a part of interstate commerce."

Jewel Tea Co. v. Williams (C. C. A. 10), 118 F. (2nd) 202, citing

Lipson v. Socony Vacuum Corporation (C. C. A. 1), 87 F. (2nd) 265;

Moore v. New York Cotton Exchange, 270 U. S. 593;

Ware & Leland v. Mobile County, 209 U. S. 405;

Schechter Corp. v. U. S., 295 U. S. 495.

DISCUSSION OF JURISDICTION.

The Mere Fact That Patent Licenses as Personal Services Deal with Products Shipped in Interstate Commerce Does Not Make Patent Licensing Interstate Commerce.

The foregoing rule has been frequently followed by this Court. The Anti-Trust Laws are based upon interstate commerce only. *United States v. Joint Traffic Association*, 171 U. S. 505, 567, 568, 573. They do not cover personal services, such as invention and licensing of patents, unless the patentee steps out of the patent laws and enters into interstate commerce—**both must concur.** *Hopkins v. United States*, 171 U. S. 578; *Anderson v. United States*, 171 U. S. 604. A patentee's intellectual work protected by statute is in the same category as the work of men who work with their hands. *United Leather Workers International Union, Local Lodge or Union No. 66, et al. v. Herkert & Meisel Trunk Company, et al.*, 265 U. S. 457; *Industrial Association of San Francisco, et al. v. United States*, 268 U. S. 64; *United States v. Yellow Cab Co., et al.*, 332 U. S. 218, 230, 234; holding that taxi cab services engaged locally in transporting passengers travelling from state to state "that such transportation is too unrelated to interstate commerce to constitute a part there, under the meaning of the Sherman Act."

It should be remembered that New Wrinkle, Inc. licensed any person, firm, or corporation with a provision for fixing the minimum sales price of its licensees pursuant to *United States v. General Electric Company et al.*, 272 U. S. 476 in reliance upon that decision, repeatedly affirmed by this Court. *It does not manufacture.*

It merely exercises its legal rights under the patents it owns to license anybody who can use the patents and they may keep their license for as long as the licensee pleases or give it up when it pleases. "The *General Electric* case construes that as giving a right to a patentee to license another to make and vend at a fixed price." *United States v. Line Material Co. et al.*, 333 U. S. 287, 312.

The Government failed to raise, by its appeal, this simple issue and tries to substitute issues not decided by the Court below for reasons this Court will doubtless understand. **Where a licensor does not sell anything in commerce nor ship any goods in commerce nor control anything that a licensee does except that he pays a royalty and must sell at a stipulated minimum price under the patent, only the patent laws apply.**

The original basis of the Motion to Dismiss is the averment in paragraphs I (2) and III (11) that "**New Wrinkle has not engaged in the commercial manufacture and sale of wrinkle finishes at any time since its incorporation in 1937,**" and therefore is not engaged in interstate commerce.

The activities of New Wrinkle, Inc., to be within the prohibition of the Sherman Act, must be a matter of interstate commerce and must be in restraint of trade or commerce among the several states, Sherman Act, Section 1. The Complaint must state a case by showing that two grounds exist which are both essential to sustain a Complaint under the Anti-Trust Acts.

A. Interstate commerce and such interstate commerce which is a part of a larger plan to control interstate markets, *outside of the patent laws.*

Standard Oil Company vs. United States, 283 U. S. 163, 169.

B. Unreasonable restraint of interstate commerce *outside of the patent laws.*

This Appellee's position is that whatever action it has taken has been purely within the scope of its lawful patent monopoly and is neither in interstate commerce nor a violation of the Sherman Act. New Wrinkle has not entered into a conspiracy with any other entity. So long as it stays within the patent laws it cannot be stopped under the Anti-Trust Laws. *United States v. Line Material Co.*, (March 8, 1948), 333 U. S. 287, 304, 307, 308, 309, 310, 312; and cases cited.

The Anti-Trust statute is based upon interstate commerce only: New Wrinkle, Inc. is not so engaged.

Under the doctrine of *Hopkins v. United States*, 171 U. S. 578, and in *Anderson v. United States*, 171 U. S. 604, *a patentee is merely selling the results of his labor in making the invention which he is authorized to do by the government of the United States when he issues a patent license.*

Even if he combines with others he is merely disposing of his personal services by way of a patent license and is not engaging in interstate commerce because he sells nothing that moves as a physical thing in trade. So long as you stay within the patent law and do not step out into any commercial non-patent operation you are not affected by the Sherman Anti-Trust Act.

United States v. Line Material Co., 333 U. S. 287, affirming *United States v. General Electric Co.*, 272 U. S. 476, *United States v. Univis Lens Co.*, 316 U. S. 241, etc.

Where an inventor or his assignee owns the patentable results of his labor, issues license contracts and does no manufacturing, his position is that of any other laborer. In *Apex Hosiery Co. v. Leader et al.*, 310 U. S. 469, this Court held that controlling goods that would be ultimately shipped in interstate commerce and in stopping a business from shipping in interstate commerce was no ground for charging a conspiracy in restraint of trade or commerce between the several states. *United Mine Workers of America et al. v. Coronado Coal Company et al.*, 259 U. S. 344; *United Leather Workers International Union, Local Lodge or Union No. 66, et al. v. Herkert & Meisel Trunk Company et al.*, 265 U. S. 457; *Apex Hosiery Co. v. Leader et al.*, 310 U. S. 469.

Patent licenses are merely a means of selling the technical brains and technical labor of the inventor. As such, it has been the settled law, repeated again in *Apex Hosiery Co. v. Leader, et al.*, 310 U. S. 469, 501, 502, that personal services and the product of personal services and their sale and even a combination of persons among themselves in the sale of their services or the results therefrom is not considered an illegal restraint of trade at common law nor under the Sherman Act, either because it is not thought to be unreasonable or because it was not deemed a restraint of trade.

A stream rises no higher than its source and patents and what they cover constitute no more than the rights of the individual inventors. It is our proposition that an individual inventor has a right under the law to sell or not sell, and to license or not license, and if he licenses to fix the price at which his licensee sells. This Court has said so many times and as recently as in *United States v. Line Material Co.*, 333 U. S. 287, affirming *United States v. General Electric Co.*, 272 U. S. 476. Therefore, having been granted

this right under the patent law to fix prices which is legal *per se* under patents and licenses, being merely the sale of personal services approved by the Supreme Court in the *Apex Hosiery* case as not being the subject of interstate commerce even when individuals combine their services, we respectfully submit that the license contracts under patents assembled together from various inventors in order to open up the rights to all their patents to anybody is not interstate commerce and, even if it were, it could not be a restraint of trade. *Apex Hosiery Company v. Leader, et al.*, 310 U. S. 469, 502:

> "* * * Since the enactment of the declaration in Sec. 6 of the Clayton Act that 'the labor of a human being is not a commodity or article of commerce * * * nor shall such (labor) organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in the restraint of trade under the antitrust laws,' * * * *"

(a) *Merely licensing under the patent law is not engaging in commerce—mere legal right to enjoy the statute* is a matter of law and not a matter of commerce.

The Appellee, New Wrinkle, Inc., has done two things as to which there is no dispute as a matter of fact: first, it has entered into a lease of its patent rights which rental agreement has the technical name under the patent law of a "License." This is authorized by patent law.

Secondly, New Wrinkle, Inc. has placed in its license agreement a requirement that it may specify the price at which its licensees sell the patented wrinkle finishes, but no agreement as to its own price. This is legal as established in *United States v. General Electric Co.*, 272 U. S. 476; *United States v. Univis Lens Co., Inc.*, 316 U. S. 241; and *United States v. Line Material Co.*, 333 U. S. 287.

The foregoing two things are performed under the patent law and are approved by the statutes and the courts.

New Wrinkle, Inc. does not sell anything in commerce nor does it ship any goods in commerce nor does it control anything that a licensee does except that he pays five cents a gallon and must sell at a Licensor *directed* minimum price under the patent.

In *United Shoe Machinery Corp., et al. v. United States*, 258 U. S. 451, 465, this Court held that the fact that United Shoe *leased its machines* and shipped them across state lines and made leases between citizens of different states did not constitute interstate commerce in and of itself. The Court said: "It is true that the mere making of the lease of the machines is not of itself interstate commerce."

Ware, et al. v. Mobile County, 209 U. S. 405.

In each case of the companies licensed by New Wrinkle, Inc, they manufacture their goods in a particular state and sell them from their factories. The license to do so is a mere contract between citizens of different states.

As Mr. Justice Stone said in *Western Live Stock, et al. v. Bureau of Revenue, et al.*, 303 U. S. 250:

> "*That the mere formation of a contract between persons in different states is not within the protection of the commerce clause*, at least in the absence of Congressional action, unless the performance is within its protection, is a proposition no longer open to question. Paul v. Virginia, 8 Wall. 168; Hooper v. California, 155 U. S. 648; New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495; cf. Ware & LeLand v. Mobile County, 209 U. S. 405; Engel v. O'Malley, 219 U. S. 128" (p. 253).

Accordingly, the Court held that "the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce" (p. 258).

In the instant case New Wrinkle, Inc.'s action is finished with granting the license, fixing the licensee price, and supplying any technical information which may help the licensee. Its action is, therefore, "distinct" from the subsequent manufacturer, who is a licensee, whose products may be circulated in interstate commerce.

Contracts for future delivery on a Board of Trade for the movement of goods in interstate commerce "are not in and of themselves interstate commerce." *Hill v. Wallace*, 259 U. S. 44, 69.

This Court followed a settled rule in *Chicago Board of Trade v. Olsen*, 262 U. S. 1, 32-3; *Moore v. New York Cotton Exchange*, 270 U. S. 593, 604; *Hopkins v. United States*, 171 U. S. 578, 588-9, 602, that contracts between citizens of different states and nothing more are not interstate commerce. The fact that as a result physical goods move in commerce across state lines is not controlling.

(b) *As a matter of law license contracts cannot be a matter of commerce.*

In *Industrial Association of San Francisco v. United States*, 268 U. S. 64, Mr. Justice Sutherland held, on behalf of a unanimous court, that contracts between contractors and dealers in building materials, which had the effect of regulating movement of materials in interstate commerce, but *which were separable from such movements*, as in the case of the patent licenses here are separable from the resulting subsequent manufacture and

shipment of wrinkle finishes by the licensees, are not interstate commerce.

Levering & Garrigues Co. v. Morrin, 269 U. S. 103;
United Leather Workers v. Herkert & Meisel Trunk Co., 265 U. S. 457;
Local 167 v. United States, 291 U. S. 293;
United States v. Hutcheson, 312 U. S. 219;
Associated Press v. Labor Board, 301 U. S. 103.

(c) Manufacturing and selling or entering into commercial activities may be commerce, but a patent license under the law does not constitute doing business. They may relate to things or events in other states than that of their execution but they do not contain any obligation to engage in any form of interstate commerce.

In the instant case, the patent laws have for many years authorized such patent licenses. To make such licenses subject to the Sherman Anti-Trust Law, such activities under them must meet two conditions:

(1) To be beyond the authority of the patent laws as interpreted by the Supreme Court of the United States,

(2) To do more than merely constitute contracts between citizens of different states, pursuant to the patent laws, even though they incidentally affect or effect ultimately the movement of licensed goods in interstate commerce.

Therefore, these contracts of license being authorized by the Federal Statutes come within the exception referred to in *United States v. Underwriters Association*, 322 U. S. 533, 560, by Mr. Justice Frankfurter, where he pointed out that if Congress had defined insurance with particularity and had enacted legislation specifically authorizing and controlling such contracts, there would have

been a different result. Logically, therefore, as patent licenses are under statutory authority of the United States they are not subject to the Anti-Trust Laws except where they are used in interstate commerce *outside of the patent laws*[1] as an instrument for which they were not intended or authorized to unreasonably restrain competition.

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[1] "* * * In these circumstances, *we must proceed to determine the issues on the assumption that General Electric continues as a precedent.* Furthermore, we do not think it wise to undertake to explain, further than the facts of this case require, our views as to the applicability of patent price limitation in the various situations listed by the government. On that assumption where a conspiracy to restrain trade or an effort to monopolize is not involved, a patentee may license another to make and vend the patented device with a provision that the licensee's sale price shall be fixed by the patentee. The assumption is stated in this way so as to leave aside the many variables of the General Electric rule that may arise. * * *" (333 U. S. 287, 304.)

"* * * **In the absence of patent or other statutory authorization,** a contract to fix or maintain prices in interstate commerce has long been recognized as illegal *per se* under the Sherman Act. This is true whether (333 U. S. 287, 307) the fixed price is reasonable or unreasonable. It is also true whether it is a price agreement between producers for sale or between producer and distributor for resale. It is equally well settled that the possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly. * * * The progress of our economy has often been said to owe much to the stimulus (333 U. S. 287, 308) to invention given by the rewards allowed by patent legislation. The Sherman Act was enacted to prevent restraints of commerce but *has been interpreted as recognizing that* **patent grants were an exception.** *Bement v. National Harrow Co., supra,* 92, 21 Cong. Rec. 2457. * * * (333 U. S. 287, 309) *The monopoly granted by the patent laws is a statutory exception to this freedom for competition and consistently has been construed as limited to the patent grant. Ethyl Gasoline Corp. v. United States,* 309 U. S. 436, 452, 455; *United States v. Univis Lens Co.,* 316 U. S. 241; *Hartford-Empire Co. v. United States,* 323 U. S. 386. It is not the monopoly of the patent that is invalid. It is the improper use of that monopoly. (333 U. S. 287, 310.) * * * (Emphasis ours.)

"* * * The patent statutes give an exclusive right to the patentee to make, use and vend and to assign any interest in this monopoly to others. *The General Electric case construes that as giving a right to a patentee to license another to make and vend at a fixed price.* * * *" (333 U. S. 287, 312.)

(d) *Any dealings between The Kay & Ess Company and New Wrinkle, Inc. were in the State of Ohio and were not interstate commerce.*

These contracts of license do not cause any movement of goods or affect the sale of goods as between the licensor and licensee. The act of making any contract which does not stipulate for the performance of an act or transaction of interstate commerce is not in itself interstate commerce. This has been held to be true even though the contract be effected by exchange of communications across state lines:

United States v. Line Material Co., 333 U. S. 287, 304, 308, 309, 310, 312 (March 8, 1948);
New York Life Ins. Co. v. Cravens, 178 U. S. 389;
Ware & LeLand v. Mobile County, 209 U. S. 405;
New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495.

"The mere fact that an anticipated local transaction causes a movement in interstate commerce is not sufficient to constitute the local transaction a part of interstate commerce."

Jewel Tea Co. v. Williams (CCA 10), 118 F. (2d) 202, citing *Lipson v. Socony Vacuum Corporation* (CCA 1), 87 F. (2d) 265; *Moore v. New York Cotton Exchange*, 270 U. S. 593; *Ware & LeLand v. Mobile County*, 209 U. S. 405; *Schechter Corp. v. United States*, 295 U. S. 495.

CONCLUSION.

This case raises some fundamental questions of public policy.

First, are we going to limit the right of any patent owner to fix the price of his licensees just because it is not wealthy enough to go into manufacturing? The Government says that only a manufacturer can have this privilege: we say that if it is good for a manufacturer, it should be good for any patent owner without discrimination on the basis of pocketbook size.

The second question is whether we are going to discriminate in favor of large companies, with many subsidiaries, who have tremendous groups of patents produced from vast research laboratories, to have all the advantages of the patent law because the large company can direct its subsidiaries to use their patents and can control their prices; while we say to the individual inventor, or the non-manufacturing patent holding company, that they cannot have the same privilege of licensing manufacturers with a price control with which manufacturers the patent holding company **is not in competition.**

Basically, **we are urging this Court to help us keep open the greatest freedom of use of patents through independent patent holding companies** as in this case. This is the only opportunity today for individual inventors and smaller patent owners, **who cannot afford to go into manufacturing**, to compete with the vast research laboratories of large concerns who have large groups of patents and who have so many subsidiaries that they can control vast segments of industry, and its prices, without any issue being raised at all.

Of course, we do not urge that, because of the size of a man's pocketbook, whether small or large, he can

conspire to violate the Anti-Trust Laws. The facts in the present case, as pleaded by the Appellant, show that could not have taken place in this case. We do vigorously urge the Court to take a look at the grave necessity for making it possible for patents to be utilized by licensing where they are owned by patent holding companies such as New Wrinkle, Inc., and whose intellectual, inventive contributions are so good that an entire industry takes licenses.

New Wrinkle, Inc. has set a pattern for promoting competition by the use of brains and technical abilities recognized by the entire industry in taking licenses and keeping the licenses even though they have the opportunity of canceling them any time they please.

A favorable decision on behalf of New Wrinkle, Inc. will open up a vast intellectual storehouse of industrial property and patents and will result in doing what all legislation can never do; **stimulate the use of the best technical brains of this country by the maximum number of companies who have the means to manufacture under them which the Licensor does not have.**

It is pointless to say to a man that he can invent and get a patent unless he can take action to make it profitable and unless he does, the public will not benefit from the use of the patent. And the individual holder, whether it be a small corporation or a person, unless it can also fix prices to its licensees like a manufacturing corporation, will have a difficult time of licensing if it opens its patents to all comers. We say this because, if a manufacturer, with a competitive group of patents, can offer a price control with his license to his competitors just because he has money enough to be a manufacturer, it is quite obvious that a non-manufacturer, perhaps with even better pat-

ents, cannot secure the licensees without equal privileges which should be open to all.

And likewise, we respectfully submit to the Court that patents should be treated, **first, in the public interest** as we feel sure you do so treat them; and, secondly, we believe in any plan such as now before this Court which will **encourage the unlocking of this intellectual storehouse of American genius and will carry out this general policy of wide use of patents in the public interest.** Such a plan puts the individual, or the smaller organization, a non-manufacturing company, in full competitive position with the vast research laboratories who are equipped to "manufacture" large numbers of patents and lock them up or use them only for their own benefit in their own organizations.

That is really the basic issue in this case.

Respectfully submitted,

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